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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 445

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.	Petition for Writ of Certiorari.
BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, *Petitioner,* vs. GEORGE R. JOSLYN, et al., *Respondents.*	

PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Benevolent and Protective Order of Elks of the United States of America (herein called "the Elks"),

prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this case on July 2, 1952 (Tr. 428); rehearing and mandate denied September 29, 1952 (Tr. 511-12).

Opinions Below.

A copy of the opinion of the Court of Appeals, filed July 2, 1952 (Tr. 422-6) as modified by order of that Court entered September 29, 1952 (Tr. 511-12) is printed in the appendix hereto. It is reported officially in *In re Joslyn's Estate,* 198 F. 2d 673.

The opinion of the District Court Judge is reported officially at 102 F.S. 521. His opinion is also to be found at Tr. 365, and his findings of fact and conclusions of law at Tr. 371. The final decree appealed from appears at Tr. 384.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The bankruptcy estate involved in this case is solvent; although the trustee in bankruptcy has been prevented from collecting any assets of the Estate. The petitioner is a large creditor in the bankruptcy proceeding (Tr. 68, 142, 381).

The Court of Appeals affirmed a so-called "Final Decree" of the District Court which: a) had the effect of substituting an Illinois State Court for the bankruptcy court in adjudication of claims of the bankruptcy creditors and of an issue of interest on the claims pending under advisement in the bankruptcy court; b) held that a payment on behalf of the bankrupt to a receiver of the state court discharged the bankrupt from claims of creditors in bankruptcy; and c) resulted in distribution of funds so paid to persons not creditors in the bankruptcy proceedings (Tr. 376-9, 384-7, 391-2). The effect of the decision and order of the Court of Appeals was to repudiate the exclusive jurisdiction of the bankruptcy court; to substitute administration by the state court; and to deprive the Elks and other creditors in bankruptcy of some twenty-years' interest on their claims while freeing to the bankrupt administrable property valued by him in his schedule at more than $500,000.

In 1932 Chicago Bank of Commerce became insolvent and went into liquidation. One Hillmer, et al., depositors of the bank, filed in the Superior Court of Cook County, Illinois, a suit (herein called the state court suit), on behalf of themselves and all other depositors, to enforce stockholders' liability. George R. Joslyn, the bankrupt herein, was a stockholder and was joined as a defendant. (Tr. 68, 372-3).

In 1936 the bankrupt, George R. Joslyn, fraudulently initiated this proceeding by filing his voluntary petition in bankruptcy in the United States District Court for the Northern District of Illinois, Eastern Division, with false schedules; and was adjudicated and discharged. In 1946 the proceeding was reopened as fraudulent on petition of the Elks. Among other frauds the bankrupt had omitted from his schedule of assets his interests under two trusts (herein called "Joslyn trusts" (valued by the bankrupt in a schedule filed after the reopening at $546,757.30)). These trust interests were later held to be administrable assets. A trustee in bankruptcy was appointed and from 1946 to 1951 he tried in vain to bring into the bankruptcy court assets of the bankrupt, including his interests under the Joselyn trusts, in order that the administration might proceed in the usual course. He filed and strenuously prosecuted three plenary suits to collect assets. (Tr. 131, 132, 140, 141, 371, 372, 374, 375, 380, 381. See also *In re Joslyn's Estate,* 168 F. 2d 803 (1948); *In re Joslyn's Estate,* 171 F. 2d 159 (1949); *Young* v. *Handwork,* 179 F. 2d 70 (1950), cer. den. 339 U.S. 949, rhrg. den. 339 U.S. 991; *In re Fisher,* 179 F. 2d 361, 363, 364, 365 (1950), cer. den. 340 U.S. 825.)

The Elks' claim is based on liability of the bankrupt as a shareholder in the bank. There is no issue respecting the principal amount of that liability ($57,100), the bankrupt having included it in his original schedule of liabilities and admitted it formally in the proceedings. There is, however, the question whether or not the creditors are entitled to interest on their claims against the solvent estate. (Tr. 68-9, 72, 119, 372, 373, 374-5.)

In 1950 the bankrupt, by his attorney, one Hubbard, presented the interest issue to the bankruptcy court for determination and, with the court's leave, filed a petition

The petition made reference to the interest issue, alleged that the bankrupt was able to pay all claims provable against the estate, and prayed that the court order the receiver of the bank to liquidate its claims, and that all persons having claims for fees should file petitions and have them determined. It also prayed that as soon as the claims were ascertained the bankrupt be given leave to pay into the bankruptcy court the claims so adjudicated, that all further proceedings in the matter be "restrained" until the claims were ascertained, and for general relief. (Tr. 67-70, 71.)

The petition and incident pleadings were referred to a referee. The Elks filed an answer jointly with other creditors adopting as theirs an answer filed by the trustee in bankruptcy and also alleging: 1) that the court was without jurisdiction to grant the prayers of the petition because of a mandate of the Court of Appeals that the proceedings continue in the usual course; 2) that by the mandate and provisions of the Bankruptcy Act the creditors were entitled as a matter of law to have the estate and all its assets administered by the trustee in bankruptcy and not by the bankrupt or anyone acting for or in collaboration with him. The trustee's answer adopted by the Elks prayed that the bankrupt's petition be denied; that judgment be entered in favor of the trustee in a plenary suit filed by him to collect accrued income of the Joslyn trusts, and that the bankruptcy proceeding be referred generally, to continue in due course. The position of the Elks was that the interest issue should be adjudicated by the bankruptcy court, after first taking possession of the administrable assets, in due course of administration. (Tr. 77-91, 102.)

In the hearing before the referee both the bankrupt and his attorney admitted that the funds he was to pay into court after adjudication of the liability and claims would

come from the trust interests which had vested in the trustee in bankruptcy, and which the trustee in bankruptcy had been vainly trying for years to collect. (Tr. 141; *Young* v. *Handwork,* 179 F. 2d 70 (1950), cer. den. 339 U.S. 949, rhrg. den. 339 U.S. 991.)

The referee conducted hearings on the issues under the petition and incident pleadings, heard testimony, considered briefs, and filed a report on March 16, 1951. (Tr. 127-183). In the report he recommended that the court enter an order that all provable claims be filed and adjudicated, and that after their filing and adjudication the court enter a further order directing the bankrupt, the trustees of the trusts, and a depositary to pay into court an amount sufficient to pay all the claims and fees. He also recommended that an order be entered restraining further efforts by the trustee in bankruptcy to collect assets upon the filing in the proceeding of written representations by the bankrupt, trustees of the Joslyn trusts and a depositary of income from those trusts, that they would, when ordered to do so, pay to the trustee in bankruptcy an amount sufficient to pay all the proven and adjudicated claims. The referee discussed the interest question in the report but made no finding or recommendation on it, except to recommend that the question be held for determination when the claims were adjudicated in the administration of the estate. The bankruptcy court took the matter under advisement on April 20, 1951 but did not pass upon the referee's report until November 8, 1951 when, in the final decree appealed from, it approved and adopted it. (Tr. 155-7, 242, 367, 384-5.)

In the meantime on July 12, 1951, while the issues presented by the petition and incident pleadings were so before the bankruptcy court under advisement,

one Hubbard, the attorney for the bankrupt in the bankruptcy proceedings, filed in the state court suit a petition in the name of the bankrupt's father, Marcellus L. Joslyn, in which the father offered to pay the bankrupt's stock liability provided the state court would adjudicate its amount at $57,100 before a specified short date. On July 18, 1951 the state court purported to so adjudicate the claim, and entered an order directing the *bankrupt* (not the father) to pay that amount to the receiver in the state court case, for the use and benefit of the creditors of the bank entitled to share in it, with interest only after the date of the decree; and pursuant to that order the father paid that amount to the receiver. (Tr. 242, 245-247, 367, 376, 378-9, designation of attorneys at 102 F.S. 521, signature to answer of bankrupt, Tr. 319.)

The state court judge who entered the order later stated in open court in explanation of its entry, that he entered it "very reluctantly" at the persistent importunity of Hubbard (attorney for the bankrupt) and only after talking about it with the judge of the bankruptcy court and a lawyer named Joseph A. Conerty, to whom the bankruptcy judge referred him; and that in entering the order he was influenced by their attitudes. Conerty is attorney in these bankruptcy proceedings for the trustees of the bankrupt's trusts, who were defendants in the plenary suit of *Young* v. *Handwork;* See 179 F. 2d 70 (1950) cer. den. 339 U.S. 949. In his statement the state court judge also said that he had required all counsel to approve the order in writing; and expressed surprise that later the lawyers went before another judge and another order was entered distributing fees. (Tr. 390, 391, 394, 396-7; Conerty's signature to pleading, p. 325; designations of attorneys at 171 F. 2d 160; 179 F. 2d 70; 102 F.S. 521.)

Upon learning of the foregoing proceedings in the state court the trustee in bankruptcy and the Elks unsuccessfully endeavored in the state court to have the state court order vacated and to induce the bankruptcy court not to enter the final decree appealed from. (Tr. 242-243, 249-260, 268-279, 279-283, 294-310, 326-334.)

Although in the final decree the District Court approved and adopted the referee's report the decree was inconsistent with it in many respects. Instead of requiring the filing of claims and adjudicating the interest question, the court in the decree and supporting conclusions of law: 1) held that the state court had the jurisdiction and power to enter its decree of July 18, 1951; 2) held that the Elks and other creditors of the bank were bound by that decree and the payment of $57,100, without any interest, in satisfaction of it; 3) held that the release given by the state court receiver to the bankrupt released the bankrupt from the claims of each creditor of the bank on his stockholder's liability; 4) held that there were no claims of creditors of the bankrupt remaining unsatisfied which were provable against the bankruptcy estate; 5) vacated four restraining orders with respect to the bankrupt's trust interests and proceeds from the trusts except with respect to $50,000 to be held pending determination of allowances; and 6) directed the trustee in bankruptcy to dismiss his plenary suits to collect assets. (Tr. 382, 383, 384-6.)

Basis of Jurisdiction.

Jurisdiction is invoked under the Act of Congress of June 25, 1948, c. 646, (1), 62 Stat. 928; U.S.C.A., Title 28, §1254, (1); 28 U.S.C. §1254, (1) and 11 U.S.C. 47.

Questions Presented.

The following questions are presented:

1. Whether the District Court had paramount exclusive jurisdiction in this proceeding of the adjudication of the liability of the bankrupt to the creditors in bankruptcy for interest on the admitted principal indebtedness of $57,100.

2. Whether the state court decree of July 18, 1951 violated the paramount exclusive jurisdiction of the District Court by purporting to adjudicate and discharge the indebtedness of the bankrupt.

3. Whether that decree, or the incident release by the state court receiver, discharged the liability of the bankrupt to the bankruptcy creditors.

4. Whether the District Court violated provisions of the Bankruptcy Act by not reducing to its possession administrable assets of the bankrupt's estate, adjudicating claims, and making distribution to creditors in the bankruptcy proceeding.

5. Whether under its exclusive jurisdiction the District Court had jurisdiction or discretion or was otherwise at liberty to rely on the state court decree which purported (1) to determine the amount of the bankrupt's indebtedness to his creditors; (2) to determine the persons entitled to receive payment of such indebtedness; and (3) to preclude the creditors from claiming interest in this proceeding against the solvent estate; and, in reliance on the state court decree, to terminate further proceedings in bankruptcy (other than the fixing of fees and expenses); thus eliminating ad-

judication and payment of claims and interest in the bankruptcy court and terminating collection by the trustee in bankruptcy of assets previously determined by the Court of Appeals to be administrable assets.

6. Whether the Court of Appeals, by affirming the Final Decree of the District Court, violated fundamental principles of bankruptcy law and so far sanctioned such a departure by the District Court in this case from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of the Supreme Court's power of supervision.

Of the foregoing questions, the answers to those numbered 1, 2, 4 and 6 should be affirmative and the answers to those numbered 3 and 5 should be negative. The decree of the Court of Appeals is in each instance inconsistent with and contrary to such answers.

Reasons Relied On For Allowance Of The Writ.

The Court of Appeals has in this cause decided federal questions in a way in conflict with applicable decisions of the Supreme Court and has so far sanctioned such a departure by the District Court from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of the Supreme Court's power of supervision.

The Court of Appeals order adversely affects the Elks in the following respects:

1. The interest issue should have been adjudicated, and interest should have been allowed, by the District Court. Instead, that court treated as binding on it and the Elks the decree of the state court allowing no interest (except interest on that decree itself): (Tr. 377, 382, 390).

2. Under the state court decree the $57,100 was paid to the state court receiver for the use and benefit of such creditors of the bank as the state court might hold were entitled to share therein, and thereby accrued to their benefit and

not to the benefit of the bankruptcy creditors. While the Elks was both a bankruptcy creditor and a creditor of the bank, the distribution of the funds by the state court receiver was prejudicial to the Elks because the funds were surcharged with expenses of the state court receivership, in the discretion of the state court and not under the supervision of the bankruptcy court.*

*Note: Undisputed evidence received in the hearings before the referee showed that in the state court suit over 41% of the total funds collected by the state court receiver to that time had been disbursed for attorneys' fees and other expenses (Tr. 145-6).

By its decision and order the Court of Appeals affirmed an abandonment by the District Court of the exercise of its paramount and exclusive jurisdiction to perform three of the most important functions of a court in bankruptcy:

1. Collection of administrable assets of the bankrupt.

2. Adjudication of claims and interest due thereon by the solvent bankruptcy estate.

3. Supervision of the distribution of assets.

The holding of the Court of Appeals, that the District Court had discretion to abdicate such basic functions to a state court, will unless reversed, establish a precedent very harmful to creditors in bankruptcy proceedings throughout the United States.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the decree of the United States Court of Appeals for the Seventh Circuit should be granted.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS of the United States of America,
Petitioner,

By .....
JOHN S. MILLER,
Attorney for Petitioner.

APPENDIX.

Opinion of Court of Appeals as Modified on Denial of Rehearing.

Before KERNER, FINNEGAN and LINDLEY, Circuit Judges.

KERNER, Circuit Judge.

This is the fifth appeal or series of appeals in the bankruptcy proceeding of Joslyn since that proceeding was reopened in 1946, ten years after his discharge in 1936.

The present appeals are from orders by which the District Court sought to terminate the seemingly endless litigation which developed after the District Court reopened the proceeding on grounds of fraudulent concealment of assets. The assets alleged to have been concealed consisted of the bankrupt's interest in the income of two trust estates established by his parents for himself and other members of his family prior to his voluntary petition in bankruptcy and not scheduled therein by him—assets which, under Illinois law, probably are not subject to execution but which this court has since held are administrable in bankruptcy. The creditor upon whose petition the proceeding was reopened, hereafter referred to as the Elks, based its claim against the bankrupt upon the latter's stockholder's superadded liability for the debts of an insolvent bank, a claim also asserted by Hillmer and others as plaintiffs in a representative suit then and still pending in the Superior Court of Cook County, Illinois, intended to recover the amounts due under the Illinois law from all stockholders in a bank incorporated under Illinois law, including this bankrupt, and brought in behalf of all creditors, including the Elks.

The final decree and other orders from which the present appeals stem allowed a motion by the bankrupt to strike a motion by the Elks for reassignment of the case for prejudice, denied a motion by the trustee in bankruptcy for leave to file a petition for certificate of civil and criminal contempt and his petition for injunctive relief, approved the well-considered report of the referee in bankruptcy, vacated restraining orders theretofore entered against the trustees of the family trusts except as they were directed to withhold a fund of $50,000 for possible further fees, costs and expenses, vacated orders restraining all persons from prosecuting suits against the bankrupt, denied without prejudice a petition for leave to intervene filed by a group of other stockholders, dismissed a counterclaim filed by the trustee in bankruptcy against those would-be intervenors, allowed fees and costs in the proceedings, directed the trustee in bankruptcy to dismiss certain plenary suits against the family trustees and others, and reserved jurisdiction to adjudicate any remaining claims against the bankrupt for fees, costs and expenses.

The facts of the various aspects of this unduly protracted proceeding have been fully stated in four opinions in the earlier appeals. See *In re Joslyn*, 7 Cir., 168 F. 2d 803, 171 F.2d 159, 179 F.2d 70 and 361. They are also succinctly stated in the opinion of the Illinois Appellate Court in a matter which that court considered to be inseparably connected with the bankruptcy proceeding. See *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 449, 457, 86 N.E.2d 367, appeal denied, 341 Ill. App. xiv. We deem it unnecessary to restate the background facts of the litigation again. As we view these appeals, the only serious question is whether the District Court abused its discretion in, in effect, approving the final settlement of the bankrupt's stockholder's liability in the state court and terminating the bankruptcy proceeding on the basis of that settlement.

The controversy on the present appeals presents the unusual situation of an adjudicated bankrupt, now fully solvent, having assets far more than enough to pay any claims which might be determined against him in this proceeding, who asked the bankruptcy court to fix those claims and authorized his representatives to pay them in full as fixed by the court, but was resisted on that application by the trustee in bankruptcy. That officer of the court insists upon his right to have all the assets of the bankrupt turned over to him to handle and distribute. While the matter was still pending in the bankruptcy court the father of the bankrupt filed a petition in the state court in the representative suit to which the bankrupt was a party defendant, asking leave to pay the principal amount in full to the receiver upon entry of judgment for that full amount against his son. This was done after informal consultation between the state court judge and the bankruptcy judge who found no objections to this practical solution of the litigation.

[1, 2] We are in entire accord with the District Court's final disposition of this protracted proceeding as explained in his excellent opinion reported in 102 F. Supp. 521. We agree that the receiver appointed in the state court representative suit was the proper claimant to receive the moneys here involved. That suit was brought in behalf of all creditors, including the Elks who have participated in distributions of moneys collected thereby to date, in accordance with the provisions of the state law. See *Hillmer* v. *Chicago Bank of Commerce,* 375 Ill. 266, 31 N.E. 2d 309. According to the Illinois decisions, a class action in equity is the proper mode of enforcing this superadded liability, and when a bank is being liquidated because of insolvency, and a representative action is pending, an individual creditor cannot maintain an action at law to enforce the liability. *Decker* v. *Domoney,* 387 Ill. 524, 56 N.E. 2d 750; *Zimmerman*

v. *Zeimer,* 363 Ill. 220, 1 N.E. 2d 854; *Babka Plastering Co.* v. *City State Bank,* 264 Ill. App. 142 See also 3 Zollmann, Banks and Banking, §§ 1842, 1823. We think these authorities fully support the District Court's disposition of the claim, in effect approving its settlement in the state court where judgment was entered for the full principal amount of the bankrupt's stockholder's liability and satisfied by payment of that amount in his behalf to the receiver.

Appellants contend that our ruling in 171 F.2d 159, 167, that "the Elks has a provable claim in the bankruptcy proceeding" is in conflict with this ruling. They assert that it follows from our earlier decision that some 12,000 creditors of the bankrupt who have participated in the state representative suit, as well as some 15,000 others who have not participated therein for reasons not disclosed on this record, are entitled to have this bankruptcy proceeding held open for the possible filing now of claims by any or all of these participating or non-participating creditors, all of which claims accrued between April 5, 1930, when the bank commenced business, and June 25, 1932, when it was closed by order of the Auditor of Public Accounts. As the trustee put it in his petition for injunctive relief, "said 15,000 (or more) creditors * * * are each individually potential creditors in bankruptcy having the right to file provable claims in this bankruptcy proceeding, and the right to receive their respective distributive shares of the administrable assets of the bankruptcy estate herein during the usual course of administration" pursuant to the mandate of this court.

It is to be remembered that when we made the ruling now relied upon by appellants we were considering an appeal from the dismissal of the entire reopened proceeding on the ground that the Elks was not a creditor of the bank-

ruptcy estate, and we considered the Illinois decisions cited above in the light of that ruling without seriously considering the right of the representative who had also asserted his claim in the reopened proceedings to prosecute it there. Although we had referred to the fact that the status of the Elks in the matter was immaterial since the trial judge could have reopened the bankruptcy proceedings *sua sponte* when his attention was called to the fact that it appeared that the bankrupt had fraudulently concealed assets, we nevertheless ruled that their claim was provable. In this situation we thought that the case, *Brown* v. *O'Keefe*, 300 U.S. 598, 57 S.Ct. 543, 81 L.Ed. 827, was authority for the proposition that the claim was provable in bankruptcy even though the stockholder had been adjudicated a bankrupt and discharged prior to liquidation of the liability and fixing of the amount thereof in the state court proceeding. But we must note now, with reference to the relative status of the representative and the individual creditors, that the claimant in the Brown case was the receiver duly appointed pursuant to the National Banking Act, a status which appears to us to be comparable to that of the receiver appointed in the course of a creditor's representative suit to enforce stockholders' liability under the Illinois law. We think Judge Igoe properly recognized this in his disposition of the cause in accordance with the judgment of the state court which had jurisdiction over the class suit. We find no violation of his discretionary powers in the action taken.

The various parties seek to raise many issues on these appeals—the court's disposition of the affidavit of prejudice and of the petition for certificate of contempt, new claims filed against the bankrupt by "non-participating creditors" in the state court proceedings, the so-called ousting of the bankruptcy court's paramount jurisdiction by its

final decree, and others. We have considered all of these issues and find them without merit, and we are convinced that no good purpose would be served by stating the facts or discussing the law pertaining to any of them.

Judgment affirmed for reasons stated by the District Court in his opinion.

IN THE

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OCTOBER TERM, 1952.

NO.

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT. BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, *Petitioner,* VS. GEORGE R. JOSLYN, et al., *Respondents.*	Petition for Writ of Certiorari.

PETITIONER'S BRIEF IN SUPPORT OF FOREGOING PETITION.

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Basis of Jurisdiction.

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Statement of the Case.

See "Summary Statement of Matters Involved," petition, p. 3 ff.

Assigned Errors.

1. The District Court erred in not exercising its exclusive jurisdiction to adjudicate the issue whether or not interest accrued upon the bankrupt's admitted principal liability of $57,100.
2. The District Court erred in not holding that such interest accrued and was payable to the creditors in the bankruptcy proceeding.
3. The District Court erred in holding that the creditors in the bankruptcy proceeding were bound by the state court decree of July 18, 1951.
4. The District Court erred in holding that the release delivered to the bankrupt by the state court receiver discharged the bankrupt's liability to the creditors in the bankruptcy proceeding.
5. The Court of Appeals erred in holding that the District Court had discretion and power to enter the Final Decree appealed from.
6. The Court of Appeals erred in affirming and not reversing the Final Decree appealed from.

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Summary of Argument.

The fact that this proceeding has been long in the courts is no justification for the decree appealed from or affirmance of it by the Court of Appeals. The delays were not due to fault of the Elks but to the bankrupt's fraud and maladministration by the District Court. 25

The entry of the Final Decree appealed from was not, as held by the Court of Appeals, an exercise of discretion by the District Court. That court had no power to enter it. 25

The matters adjudicated by the state court decree of July 18, 1951 were wholly within the exclusive jurisdiction of the District Court and the Elks had a right to have them adjudicated by it. 26, 27

If the District Court Judge acquiesced in or consented to the entry of that state court decree this would not validate it. 27

The decree was a nullity so far as concerns the bankruptcy proceeding; and the District Court had no jurisdiction to hold that the Elks were bound by it, or that the incident release discharged the bankrupt's liability to the Elks. 27

The bankruptcy estate being solvent, interest is due upon the admitted principal liability ($57,100) at the rate of 5% per annum, both on general equitable principles and also because of unreasonable and vexatious delay of payment. 28

The Court of Appeals so far sanctioned such a departure by the District Court from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of this Court's power of supervision 30

ARGUMENT.

I.

Both the Court of Appeals and the District Court emphasize in their respective opinions the fact that the administration of this bankruptcy proceeding has been protracted. This was certainly not due to any fault of the Elks. Clearly it was due in the first instance to the bankrupt's fraud, and later to maladministration by the District Court, as is evidenced by the fact that that Court was reversed by the Court of Appeals in every one of the three adjudicated appeals from administrative orders entered by it. (168 F. 2d 803; 171 F. 2d 159; 179 F. 2d 70.)

Desire to terminate the proceeding is surely no justification for depriving the Elks of its right to an adjudication of its claim by the bankruptcy court and relegating this adjudication and the distribution to the state court.

II.

No Exercise of Discretion is Involved. The District Court Had No Power to Enter the Final Decree.

The Court of Appeals considered the Final Decree an exercise of discretion by the District Court. (Tr. 424, 426.) On the contrary, the District Court had no power to enter it.

The bankruptcy court had exclusive jurisdiction to adjudicate the question whether the Elks' claim bore interest, to collect the amount it found due, and make distribution in the proceeding.

These functions were inherent parts of the administration of the bankruptcy proceeding, and within the delegation of powers under Art. I §8 of the United States Constitution, 11 U.S.C. §11, and 28 U.S.C. §1334.

> U. S. Constitution, Art. I §8: "The Congress shall have Power . . . to establish uniform Laws on the subject of Bankruptcies throughout the United States;"
>
> 11 U. S. C. § 11: "a. The courts of the United States hereinbefore defined as courts of bankruptcy . . . are hereby invested . . . with such jurisdiction . . . as will enable them to exercise original jurisdiction in proceedings under this title . . . to . . . (2) Allow claims, disallow claims . . .; (7) Cause the estates of bankrupts to be collected, reduced to money and distributed. . . ."
>
> 28 U. S. C. §1334: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

The adjudication of claims against the bankrupt and collection and distribution of his estate, are basic functions of a court of bankruptcy clearly within the exclusive jurisdiction of the court administering the bankruptcy, both under the foregoing enactments and under decisions of the Supreme Court (*U. S. Fidelity Co.* v. *Bray,* 225 U.S. 205, 218 (1911), *Pepper* v. *Litton,* 308 U.S. 295, 304 (1939)).

In the *Bray* case, the Supreme Court remarks, with respect to such exclusive powers (225 U.S., p. 218), that "Creditors are entitled to have this authority exercised."

Referring to the exclusive powers of a bankruptcy court the Supreme Court remarks in its opinion in the *Pepper* case (308 U.S., p. 304):

> "Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankruptcy. . . . In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts."

The bankruptcy court cannot consent to the exercise of these exclusive functions by another court; and it is irrelevant if in this case the District Court judge consented to or acquiesced in the state court order (*U. S. Fidelity Co.* v. *Bray*, 225 U.S. 205, 218 (1911); *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739 (1930)).

Examples of the exercise of such jurisdiction in bankruptcy, in issues respecting interest on claims, are: *New York* v. *Saper*, 336 U.S. 328 (1948); *Littlefon* v. *Kincaid*, 179 F. 2d 848 (CCA 4th C. 1950) cer. den. 340 U.S. 809; *Johnson* v. *Norris*, 190 Fed. 459 (C.C.A. 5th C. 1911).

The issues adjudicated by the state court being within the exclusive jurisdiction of the bankruptcy court, the District Court had no power to hold that the Elks were bound by the state court order entered July 18, 1951, and had no power to hold that the release executed by the state court receiver released the bankrupt from the claim of the Elks, either principal or interest (*U.S. Fidelity Co.* v. *Bray*, 225 U.S. 205, 218 (1911); *Pepper* v. *Litton*, 308 U.S. 295, 304 (1939). See also *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819) and *International Shoe Co.* v. *Pinkus*, 278 U.S. 261 (1928).

The state court order of July 18, 1951 was, under the authorities cited above, an utter nullity so far as the bankruptcy proceeding was concerned. It and the incident release left the bankrupt still as liable as before its entry to the creditors in bankruptcy.

Had the order the effect to release the bankrupt's liability to the bankruptcy creditors, it would take from administration in bankruptcy administrable assets of the bankrupt. If the father's payment (whether from his own

funds or from funds obtained from or loaned to the bankrupt) released the bankrupt's liability in bankruptcy, a bankrupt could thwart his bankruptcy creditors and bring about a distribution outside of bankruptcy. In fact just such a distribution occurred by the payment of fees (Tr. 392).

III.

The bankruptcy estate being solvent, interest is due upon the admitted principal liability of $57,100 to the extent of the surplus over the total claims and expenses in the bankruptcy proceedings.

In note 7 to its opinion in the case of *New York* v. *Saper*, 336 U.S. 328, 330 (1948) the Supreme Court states the applicable law: that where a bankrupt (*i.e.*, his bankruptcy estate) proves solvent, interest is due the bankruptcy creditors before any surplus reverts to him.

This rule was recognized and applied in bankruptcy proceedings in *Johnson* v. *Norris*, 190 Fed. 459, 461-5 (C. C. A. 5th C. 1911), *Miles Corporation* v. *Lindel*, 107 F.2d 729, 732 (C.C.A. 8th C. 1939) and *Littleton* v. *Kincaid*, 179 F.2d 848, 852-3 (C. A. 4th C. 1950)

Under the holding in the *Johnson* case the interest accrues upon all claims proved and allowed.

The applicable rate is 5% under the provisions of the following statute of Illinois:

> "The rate of interest upon the loan or forbearance of any money, goods or things in action, shall be five dollars ($5) upon one hundred dollars ($100) for one year, and after that rate for a greater or less sum, or for a longer or shorter time. . ." Ill. Rev. St. 1951, State Bar Assn. Edn., Ch. 74 "Interest" §1.

IV.

The interest is payable not merely under general equitable principles, as held in the foregoing cases, but also because of the bankrupt's unreasonable and vexatious delay of payment.

Such liability is codified in Illinois:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due. . . on money withheld by an unreasonable and vexatious delay of payment." Ill. Rev. St. 1951, Stat Bar Assn. Edn., Ch. 74 "Interest" §2.

It is recognized in the following, among many, decisions of the Illinois courts: *Duncan* v. *Dazey,* 318 Ill. 500, 526-7 (1925); *Borden & Selleck Co.* v. *Fraser & Chalmers,* 118 Ill. App. 655, 661-2 (1905). Also by this Supreme Court in *Chicago* v. *Tebbetts,* 104 U.S. 120, 125 (1881); and by other Federal Courts in *Reconstruction Finance Corp.* v. *Goldberg,* 143 F. 2d 752, 759 (CCA 7th C 1944): *Reconstruction Finance Corp.* v. *Pelts,* 123 F.2d 503, 505 (CCA 7th C 1941); *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.,* 85 F. 2d 531, 536 (CCA 2nd C 1936); and *Riverside Fibre and Paper Co.* v. *O. C. Keckley & Co.,* 32 F. 2d 23, 26 (CCA 7th C 1929).

The present case is a most extreme instance of unreasonable and vexatious delay of payment. The fraudulent bankrupt admitted the principal amount of the liability in his first (fraudulent) schedule, obviously for the purpose of being discharged from it. He succeeded by his fraud in getting his discharge in 1936. From then until the bankruptcy proceeding was reopened in 1946, although owning properties worth, on his own admission, over

$500,000, he made no payment. Since this proceeding was reopened (for his fraud) in 1946, he has resisted payment with no sound legal reason whatever, as the principal amount was admitted and his interests in the trusts were administrable in bankruptcy. Finally, by an unlawful maneuver in the state court, he has thwarted adjudication of his liability and collection and distribution of the estate in the bankruptcy proceeding.

V.

The Court of Appeals so far sanctioned such a departure by the District Court from the accepted and usual course of bankruptcy proceedings as to call for an exercise of the Supreme Court's power of supervision.

The bankruptcy court unlawfully departed from the accepted and usual course of bankruptcy proceedings:

1. By surrendering to the state court the adjudication of the interest issue while that issue was pending before the District Court under advisement.
2. By holding that the state court decree bound the bankruptcy creditors and discharged the bankrupt from liability to them.
3. By failing to adjudicate the question whether the bankrupt's admitted principal liability of $57,100 bore interest.
4. By not holding that the liability did bear interest.
5. By ordering the trustee in bankruptcy to dismiss the plenary suits brought by him for the purpose of collecting the assets of the bankruptcy estate although the bankruptcy creditors remain unpaid.

6. By terminating the bankruptcy proceeding (except for allowance of fees and expenses) although the assets remained uncollected and the creditors had not been paid.

The Elks was seriously injured by the loss of some twenty-years' interest on its claim in bankruptcy.

The Court of Appeals sanctioned this departure by affirming the Final Decree.

It is submitted that the foregoing constitutes sanction by the Court of Appeals of such grave departure by the District Court from the accepted and usual course of bankruptcy proceedings as to call for an exercise by the Supreme Court of its power of supervision.

CONCLUSION.

The Final Decree appealed from was, for the reasons shown, without the jurisdiction of the District Court and in conflict with the law as decided by this Court; and by it the District Court departed drastically and unlawfully from the accepted and usual course of bankruptcy proceedings. The Final Decree constituted a flagrant abandonment by the District Court of its exclusive jurisdiction which, if the affirmance by the Court of Appeals is not reversed, will constitute a precedent seriously affecting administration of bankruptcy proceedings.

The writ of certiorari should issue as prayed in the petition.

Respectfully submitted,

JOHN S. MILLER,
Attorney for Petitioner.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 445

IN THE MATTER OF
GEORGE R. JOSLYN,
BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,
vs.
GEORGE R. JOSLYN, et al.,
Respondents.

Petition for Writ of Certiorari.

AMENDMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

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Respondents.

Petition for Writ of Certiorari.

AMENDMENT TO PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The following paragraph, appearing at top of page 8 of the petition:

> "Upon learning of the foregoing proceedings in the state court the trustee in bankruptcy and the Elks unsuccessfully endeavored in the state court to have the state court order vacated and to induce the bankruptcy court not to enter the final decree appealed from. (Tr. 242-243, 249-260, 268-279, 279-283, 294-310, 326-334.)"

is amended to read as follows:

> "Upon learning of the foregoing proceedings in the state court the Elks unsuccessfully endeavored in the state court to have the state court order vacated and the trustee in bankruptcy and the Elks unsuccessfully endeavored to induce the bankruptcy court not to enter the final decree appealed from. (Tr. 242-243, 249-260, 268-279, 279-283, 294-310, 326-334.)"

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,

Petitioner,

by .....

JOHN S. MILLER,

Attorney for Petitioner.

Office - Supreme Court, U.S.
DEC 11 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

VS.

GEORGE R. JOSLYN, *Et Al.,*
Respondents.

PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____

IN THE MATTER OF GEORGE R. JOSLYN,
BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

GEORGE R. JOSLYN, *Et Al.,*
Respondents.

PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matters Involved.

Your Petitioners, NEW JERSEY EQUITIES COMPANY and HORACE A. YOUNG, as Trustee in Bankruptcy, praying for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit made and entered in this cause on July 2, 1952 (Tr. 428), rehearing denied September 29, 1952 (Tr. 511-2), respectfully submit:

For purposes of brevity, and in order to lighten the labors of this Court, Petitioners adopt in all respects the "Petition of The Benevolent and Protective Order of Elks of the United States of America for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and Brief in Support Thereof" heretofore filed in this Court as Docket No. 445, to the same extent as though all of said Petition and Supporting Brief were set forth fully and at length herein.

However, Petitioners desire to add to both said Petition and Supporting Brief of The Benevolent and Protective Order of Elks of the United States of America certain additional facts and certain additional argument as follows:

Summary Statement of Additional Matters Involved.

(1) Petitioner, New Jersey Equities Company, is a substantial creditor of the fraudulent bankruptcy estate of George R. Joslyn (Tr. 335) and is one of a group of so-called "non-participating" bankruptcy creditors (*i.e.* "non-participating" in the sense that they have not filed claims and never have received, and never will receive, any funds distributed or to be distributed in the Illinois State Court proceedings referred to in said Petition and

Brief in Docket No. 445. (Tr. 276, 425). Said "non-participating" bankruptcy creditors hold bankruptcy claims which are presently unpaid in the total sum of $1,207,155.10 (Tr. 276, 425).

There are also so-called "participating" bankruptcy creditors, including The Benevolent and Protective Order of Elks of the United States of America (filing said Petition in Docket No. 445), whose presently unpaid bankruptcy claims total $1,182,161.98 (Tr. 276, 425).

Petitioner, New Jersey Equities Company, speaks in this Petition for itself and for all of said "non-participating" bankruptcy creditors, not by any right of direct representation, but in the sense that all of such "non-participating" bankruptcy creditors are in the same situation, *i.e.* none of them has ever received or ever will receive any part of the sum of $57,100 or any other funds distributed or to be distributed in the Illinois State Court proceedings hereinabove mentioned. All of them will have been irretrievably injured by the final decree appealed from, unless this Court shall grant the writ of certiorari sought herein, for the reasons hereafter stated.

Petitioner, Horace A. Young, as Trustee in Bankruptcy, speaks for and represents all of said bankruptcy creditors in the Bankruptcy Court, whether "non-participating" or "participating".

(2) Neither Petitioner, New Jersey Equities Company, nor any other "non-participating" bankruptcy creditor, nor Petitioner, Horace A. Young, as Trustee in Bankruptcy, ever had any actual knowledge of or ever participated in the State Court proceedings involved in this matter prior to the time of the entry of the State Court order of July 18, 1951 (Tr. 242). No order was ever entered in the bankruptcy proceedings of the fraudulent bankrupt, George

R. Joslyn, either prior or subsequent to the entry of the State Court order of July 18, 1951, authorizing or directing Petitioner, Horace A. Young, as Trustee in Bankruptcy, to participate in said State Court proceedings. The first knowledge that Petitioner, New Jersey Equities Company, or any of the other "non-participating" bankruptcy creditors, or the Trustee in Bankruptcy, had of the State Court proceedings was on or a few days before September 11, 1951, when the fraudulent bankrupt disclosed the same to the Bankruptcy Court and obtained leave to file in the Bankruptcy Court a certified copy of said State Court order and a duplicate original of the purported "release" executed by the State Court Receiver in accordance therewith (Tr. 242-3).

On September 13, 1951, two of the bankruptcy creditors (The Benevolent and Protective Order of Elks of the United States of America and John Marshall Law School, the latter not yet having filed any bankruptcy claim) sought to intervene in the State Court proceedings to attack the order of July 18, 1951, but their motion for leave to intervene was denied on September 20, 1951 (Tr. 295-310, 347-8, 358-365).

(3) The fraudulent bankrupt, George R. Joslyn, having obtained his discharge in bankruptcy on June 29, 1936, asserted said discharge at all times thereafter as a valid defense to his stockholder's liability in the State Court proceeding (Tr. 354-6). At the time the order of July 18, 1951 was entered in the State Court proceeding, no reference was made to the defense of the discharge in bankruptcy still asserted therein as a defense by the fraudulent bankrupt, George R. Joslyn, therein (Tr. 246-7, 348-9, 353).

(4) The State Court order of July 18, 1951 was not a judicial decree, but was merely a *consent order* (Tr. 353).

It bore at the foot thereof the signatures of all of the parties appearing in the State Court in the summer vacation period before the emergency judge, except the attorney for Marcellus L. Joslyn, the father of the fraudulent bankrupt, who also represented the bankrupt in the Bankruptcy Court (Tr. 353). His consent was evidenced by the fact that he presented the petition seeking the entry of the order. The State Court Judge (Julius J. Hoffman) stated that: "It took a couple of hours to persuade the lawyers to place their signatures on the order", and that he would not have entered the order if it had not been "agreed to" (Tr. 393). Moreover, the State Court Judge clearly stated that he would not have entered the *consent order* if he had not been under the erroneous impression that all of the attorneys interested in the matter were then before him (Tr. 393-4).

Such consent orders are not judicial decrees, but are mere agreements of the consenting parties judicially recorded.

(5) The amount of interest due upon the claims of the bankruptcy creditors in the "solvent" bankruptcy estate (Tr. 424) was not and is not a trivial sum. At the time of the entry of the order appealed from in the Bankruptcy Court, the amount of such interest exceeded the sum of $40,000, and this fact was made known to the Bankruptcy Court by the Trustee in Bankruptcy prior to the entry of the final decree appealed from (Tr. 281). It was also embodied in the Referee's Report filed long previously on March 16, 1951 (Tr. 131).

(6) The defunct Chicago Bank of Commerce was an Illinois state bank, not a national bank. Each of the creditors of Chicago Bank of Commerce, including Petitioner, New Jersey Equities Company, and each of the other "non-participating" creditors holding presently un-

paid bankruptcy claims totaling $1,207,155.10, as well as each of the so-called "participating" bankruptcy creditors holding presently unpaid bankruptcy claims totaling $1,182,161.98, were individual creditors of the bank entitled under Illinois law to sue the bank's stockholders (Tr. 425). Under Illinois law, the filing by a representative bank creditor of a suit against stockholders to enforce their stock liability prevents the filing thereafter of individual suits against stockholders by other bank creditors (Tr. 425).

In this respect, the liquidation of a national bank differs from the liquidation of an Illinois state bank. Under Title 12, Sec. 191-2 of the United States Code, the Receiver appointed by the Comptroller of the Currency under Title 12, § 191 has the exclusive right to enforce the individual liability of the stockholders, if necessary to pay the debts.

(7) The final decree appealed from, which was entered in the District Court and affirmed in the Court of Appeals, permanently harms the bankruptcy administration and the bankruptcy creditors (1) because it held that the creditors' claims have all been adjudged satisfied in the Illinois State Court and the bankrupt fully discharged from all liability therefor, and (2) because it ordered the Trustee in Bankruptcy to dismiss the three pending plenary actions to collect the administrable bankruptcy assets, and modified the restraining orders preventing dissipation of said administrable assets, and (3) because it prevents the collection of the administrable bankruptcy estate and the adjudication and payment of bankruptcy claims, including over $40,000 of interest thereon, in the Bankruptcy Court.

The fraudulent bankruptcy was re-opened in 1946, and the plenary actions were filed within two years thereafter (Tr. 129, 268; *Young* v. *Handwork,* 179 F. (2d) 70 at 71, cert. den. 339 U.S. 959, rhrg. den. 339 U.S. 991). In view

of the fact that more than five years had already elapsed between the re-opening of the fraudulent bankruptcy and the entry of the final decree appealed from on November 8, 1951, that part of the decree appealed from directing the Trustee in Bankruptcy to dismiss the three pending plenary actions to collect the administrable assets is prejudicial to the bankruptcy estate and creditors because such suits cannot be reinstituted either within the two-year statutory period for the commencement of such actions under Section 11(e) of the Bankruptcy Act, or within the five-year statutory limitation period under state law (Illinois), likewise referred to in Section 11(e) (Tr. 129).

The final decree herein appealed from, as we have said, permanently harms the bankruptcy administration and the bankruptcy creditors because it modified the four restraining orders so as to release to the bankrupt the same administrable assets which the Trustee in Bankruptcy was attempting to collect in the plenary actions, and which were conceded by the sworn statement of the bankrupt himself to have a value in excess of $500,000 (Tr. 235; *In re Joslyn's Estate,* 168 F. (2d) 803 at 804). The purpose and effect of these four restraining orders was to prevent the fraudulent bankrupt and his personal Trustees (the Trustees of the Joslyn Trusts) from dissipating the administrable assets pending their collection and administration by the Trustee in Bankruptcy in the Bankruptcy Court (Tr. 385).

The fraudulent bankrupt, George R. Joslyn, fraudulently instituted these voluntary bankruptcy proceedings in 1936 for the purpose of depriving his bankruptcy creditors of their right to adjudicate and satisfy their bankruptcy claims, and for the purpose of preventing the bankruptcy administration of these very bankruptcy assets of

a value of more than $500,000, as established by "the law of the case" in the three prior appeals to the Seventh Circuit Court of Appeals (see page 4 of the Petition for Certiorari in Docket No. 445).

The effect and decision of the Court of Appeals is therefore (1) to repudiate the "paramount and exclusive jurisdiction" of the Bankruptcy Court over the fraudulent bankruptcy estate of George R. Joslyn; (2) to permit the consummation by the bankrupt of the fraudulent scheme initiated by him in 1936, and persisted in by him to the present date; (3) to substitute bankruptcy administration by a State Court in place of the Bankruptcy Court, by permitting the State Court to adjudicate the bankruptcy claims and satisfy them for more than $40,000 below the amount payable thereon in the Bankruptcy Court and to discharge the same; (4) to deprive Petitioner, New Jersey Equities Company, and the other "non-participating" bankruptcy creditors of the right to receive one penny of the bankruptcy assets, at the same time freeing to the fraudulent bankrupt administrable property valued by him in his own sworn schedule at more than $500,000; and (5) by preventing the Trustee in Bankruptcy from collecting any of the administrable assets for the purpose of paying the unpaid bankruptcy creditors, including the sums due them by way of interest in the "solvent" bankruptcy proceeding.

Questions Presented, Basis of Jurisdiction, Opinions Below and Assigned Errors.

See Petition of The Benevolent and Protective Order of Elks of the United States of America for Writ of Certiorari in Docket No. 445 and Brief in Support Thereof, all heretofore adopted and incorporated by Petitioners herein.

Reasons Relied On For Allowance of Writ.

The decision of the Court of Appeals in this case violates the paramount and exclusive jurisdiction of the Bankruptcy Court, and thereby violates the most basic and fundamental principles of bankruptcy law. It is therefore directly in conflict upon a question of fundamental Federal law with the Constitution and Statutes of the United States and the decisions of this Court and the other Courts of Appeals, and thereby justifies and requires an exercise of this Court's power of supervision.

Petitioner, New Jersey Equities Company, is a bankruptcy creditor in a substantial amount. Petitioner, New Jersey Equities Company, never participated in any way whatsoever in the State Court representative suit and has never received any distribution or payment upon its bankruptcy claim of any kind, nature or description, either through such proceeding or otherwise (Tr. 335-6). Not only Petitioner, but all of the other "non-participating" creditors holding provable bankruptcy claims in the amount of $1,207,155.10, will never receive any payment thereof if the District Court's order as affirmed by the Court of Appeals is not reversed by this Court.

Petitioner, Horace A. Young, as Trustee in Bankruptcy, speaks not only for the "non-participating" creditors, but also for the so-called "participating" creditors holding provable bankruptcy claims totaling $1,182,161.98.

It is thus beyond controversy that Petitioner, New Jersey Equities Company, and the other "non-participating" creditors have been deprived and will be forever deprived of their distributive share of the sum of more than $97,100 ($57,100 plus more than $40,000 of interest) by the order here appealed from. Moreover, the so-called "participating creditors", including the Order of Elks, for whom the

Trustee in Bankruptcy also speaks, will similarly be deprived of their distributive share of more than $40,000 of interest even if it be conceded (which they do not concede) that the distribution of all or some part of the sum of $57,100 paid to the State Court Receiver under the State Court order should ultimately be held in the bankruptcy proceedings to be properly credited upon their bankruptcy claims.

The creditors, "participating" or "non-participating", have never waived their respective rights to have their bankruptcy claims adjudicated and satisfied in the Bankruptcy Court. Nor has the Trustee in Bankruptcy ever waived his right to collect the administrable assets and distribute the same in the bankruptcy proceedings after the adjudication of the bankruptcy claims by the Bankruptcy Court.

If the relief sought in this Court be not granted, the fraudulent purposes of the bankrupt will be consummated and when the bankruptcy proceedings are finally closed, the bankruptcy creditors will be deprived of any payment to them of more than $40,000 of interest due them upon their claims against the solvent bankruptcy estate; and Petitioner, New Jersey Equities Company, and the other "non-participating" creditors will receive no payment whatsoever of their distributive share of the sum of $57,100 to which they are entitled upon their bankruptcy claims.

This case raises in the sharpest possible manner the question whether the Federal Bankruptcy Court has "*discretion*" to repudiate its "paramount and exclusive *jurisdiction*" in bankruptcy matters, and to substitute therefor an administration in the State Court which is uncontrovertibly prejudicial to the bankruptcy creditors. Not only is this matter important, but it is in fact crucial to the administration of all bankruptcy proceedings hereafter in

the Federal Courts. *It is essential to the effective operation of the Federal Bankruptcy Act and the preservation of the paramount and exclusive jurisdiction of the Federal Courts in bankruptcy matters that the decision of the Court of Appeals affirming the District Court be reversed.*

If the clear language of the Bankruptcy Act and the numerous decisions of this Court and the other Courts of Appeals establishing and enforcing the paramount and exclusive jurisdiction of the Bankruptcy Court in bankruptcy matters are to be overthrown, it should only be by a square decision of this Court to that effect.

Wherefore, Petitioners pray that a writ of certiorari under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that said final order of said Court of Appeals be reversed or altered by this Honorable Court; and Petitioner also prays for all such other, further or different relief as may seem proper.

NEW JERSEY EQUITIES COMPANY

By .....
GERALD G. BARRY, ITS ATTORNEY

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

By .....
PRO SE, PETITIONERS.

BRIEF AND ARGUMENT.

As above indicated, Petitioners adopt the brief and argument attached to the Petition for Writ of Certiorari heretofore filed in Docket No. 445.

The Court of Appeals' opinion appears to be wholly based upon the false premise that the final decree appealed from was within the proper exercise of the "discretion" of the District Court. Expressed negatively, the Court of Appeals refused to disturb the final decree, upon the theory that it would not disturb the proper exercise of "discretion" by the District Court.

By so holding, the Court of Appeals completely misapprehends the fundamental existence of the paramount and exclusive jurisdiction of the District Court in bankruptcy proceedings.

Certainly the Court of Appeals fails to indicate how the District Court can have "discretionary power" to defeat the "paramount and exclusive jurisdiction" of the Federal Bankruptcy Court. The two terms are mutually exclusive. As succinctly stated by this Court in *United States Fidelity & Guaranty Company* v. *Bray*, 225 U.S. 205, the Federal Bankruptcy Court has no power whatsoever, either "discretionary" or otherwise, to surrender its paramount and exclusive jurisdiction to any other Court, State or Federal, over all bankruptcy proceedings and particularly "the allowance, rejection and reconsideration of claims, the reduction of estates to money, and its distribution," etc. (p. 217).

We remind the Court of its conclusive words upon this subject in the same opinion (p. 218):

> "Of the fact that the suit was begun in the Circuit Court with the express leave of the Court of Bankruptcy, it suffices to say that *the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal.*" (Italics added.)

This Court has always in its subsequent references to the *Bray* case re-affirmed the strong language and clear holding of that decision. See, for example, *New York* v. *Irving Trust Co.*, 288 U.S. 329, 332 and *Pepper* v. *Litton*, 308 U.S. 295, 304.

The Court of Appeals for the Seventh Circuit itself stated the same rule in the important recent case of *In re Lustron Corp.*, 184 F. (2d) 789, cert. den. 340 U.S. 946, saying (p. 800):

> "After bankruptcy has occurred, the Bankruptcy Court is without power to surrender its paramount and exclusive jurisdiction." (Citing *U. S. F. & G. Co.* v. *Bray* and other Supreme Court and Federal cases.)

If the foregoing rule is the most fundamental principle of bankruptcy law, and we deem it to be, the Court of Appeals' decision affirming the District Court's decree upon the ground that the Bankruptcy Court had "discretion" or "discretionary powers" to surrender its paramount and exclusive bankruptcy jurisdiction must be wholly erroneous. By so holding the Court of Appeals has in effect wiped out the cornerstone of all bankruptcy law and has nullified the Federal Constitution, the Federal Bankruptcy Act and this Court's emphatic holdings to the contrary.

At this very October 1952 Term this Court has recognized that the rule that "the bankruptcy court normally supervises the liquidation of claims . . . . . is not inexorable

. . . . . and a sound discretion may indicate that a *particular controversy* should be remitted to another tribunal for litigation." *Nathanson* v. *National Labor Relations Board*, ... U.S. ...., 97 L. Ed. (Advance p. 13, 17). (Italics added). In the instant case this concept has been distorted by the Court of Appeals to the point of permitting a State court (1) to determine not only the principal amount of a claim (although the amount had been previously admitted and stipulated to in the bankruptcy proceeding) (2) by a consent order entered at a hearing of which neither the Trustee in Bankruptcy nor the creditors (petitioners here) had notice and in which hearing they did not participate (no order of remittal to the state court having ever been entered) and (3) then to *collect* and *distribute* the assets and (4) at the same time to satisfy and discharge the bankruptcy claims of creditors in such manner as to preclude the collection of $40,000 of interest due the creditors under bankruptcy law because of the solvency of the estate. Unless this Court intends by such language as that quoted above to retract what has been written as to the paramount and exclusive jurisdiction of Courts of Bankruptcy in the statutes and in numerous reported decisions of this and other courts across a period of many years, this Court must grant this petition and revise the judgment of the Court of Appeals. Otherwise the door is open for a lower Federal court to relegate any part or *all* of a bankruptcy proceeding to a State court.

We submit that the Court of Appeals, in reaching the foregoing conclusion, misapprehended the case of *Brown* v. *O'Keefe*, 300 U.S. 598. Since the *Brown* case is not discussed in the argument supporting the petition in Docket No. 445, and since the Court of Appeals places so much emphasis upon it, we will discuss that case here.

The *Brown* case was not a bankruptcy case, but was a suit by the receiver of a national bank in whom (unlike Illinois state banks, such as the Chicago Bank of Commerce) all of the bank creditors' rights to enforce the stockholders' liabilities are exclusively vested by Title 12, Sections 191-2 of the United States Code (12 U.S.C.A., Secs. 191-2). These sections provide:

> "191. . . . Whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may . . . appoint a receiver who shall . . . enforce the personal liability of the shareholders, as provided in section 192 of this title."
>
> "192. Such receiver . . . may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

In the case of the Chicago Bank of Commerce, the right to sue the stockholders is vested under Illinois law, exclusively in the bank creditors themselves, either singly or as a group, and is personal to each creditor. Some of the decisions are cited in the Court of Appeals' opinion (Tr. 425). These Illinois cases also hold that a representative suit filed on behalf of the bank creditors prevents the filing of subsequent individual suits for the same relief.

A State Court receiver in an Illinois stockholders' representative suit is a "stakeholder". His sole function is to receive and disburse moneys collected from the defendant stockholders. Unlike the receiver of a national bank, he is appointed in the representative suit after it is filed, not before it is filed.

The analogy which the Court of Appeals finds between such a stakeholder-receiver in a stockholders' representative suit in Illinois, on the one hand, and the national bank receiver of a national bank appointed by the Comptroller of the Currency, on the other hand, is obviously without any sound basis or justification.

Turning to the decision in the *Brown* case, Judge Cardozo's opinion explicitly states (p. 604) that he is not deciding whether such a national bank receiver could file a bankruptcy claim in the Bankruptcy Court. The only issue decided in the *Brown* case was that the bankruptcy discharge asserted by the bankrupt-defendant in a non-bankruptcy suit was valid and effective to protect him from any liability to a single bankruptcy creditor. The Court was careful to state in its opinion (p. 604-5) that the only issue which the Bankruptcy Court could refer to the State Court for determination was the "liquidation" of the principal amount of the bankrupt's total stock liability if the Bankruptcy Court did not desire to determine this issue for itself.

But once the principal amount of the bankrupt's stock liability was liquidated (as in the Joslyn bankruptcy here involved), the single creditor would have to file his bankruptcy claim in the Bankruptcy Court in order not to "lose his dividend from the assets and find his suit in equity (in the State Court) illusory" (p. 605).

In the case at bar, there has never been any doubt or question as to the "liquidation" or determination of the total principal amount of Joslyn's stock liability. In both his original (fraudulent) and amended bankruptcy schedules, as well as in numerous sworn petitions filed by the bankrupt in the Bankruptcy Court (Tr. 235-6), he consistently admitted, and the Referee confirmed (Tr. 235), that the principal amount of his total stock liability was "liquidated" at the face amount of the par value of his stock holdings in the sum of $57,100. It must follow that under prior Section 63(b) (now Section 57(d)) of the Bankruptcy Act, no proceedings in the State Court were necessary to "liquidate" and determine the total principal amount of the bankrupt's stock liability as a stockholder in the Chicago Bank of Commerce.

Applying the holding of the *Brown* case therefore, there was and is nothing left for the State Court by way of the "liquidation" or determination of the principal amount of Joslyn's total stock liability. The only Court having any jurisdiction to collect the principal amount of the bankrupt's stock liability as so "liquidated" or determined, and to pay the "dividends" from the bankruptcy "assets" was and is the Bankruptcy Court, as Judge Cardozo was careful to state on page 605 of his opinion, where these very words are used. His use of the word "Tomorrow" in this connection could only have been intended to prevent exactly the result which the Court of Appeals' decision affirming the District Court achieves in this case.

To summarize: The State Court Receiver in the representative suit under Illinois law in the case at bar has no claim or cause of action against the stockholder, whether bankrupt or not bankrupt, but is merely a *judicial stakeholder* without rights of any kind against the stockholder. In the bankruptcy case he has no standing as a creditor and is certainly not an officer of the Bankruptcy Court. His "status" cannot be "comparable" to that of the receiver of the national bank acting as sole "liquidating agent" in the *Brown* case; and even if his status were comparable, there is nothing in the *Brown* case which holds that even the national bank receiver in that case could collect the bankrupt's stock liability outside of the Bankruptcy Court. In fact, as above indicated, the holding in the *Brown* case was precisely to the contrary.

As if foreseeing this very case, Judge Cardozo made it crystal clear that the bankruptcy creditors, such as petitioner, New Jersey Equities Company, and the other creditor Appellants, shall not be prevented from recovering their "dividends" from the bankruptcy "assets," even

if the State Court had been appealed to in order to "liquidate" the total principal amount of Joslyn's stock liability (which was wholly unnecessary because of his admissions in the case at bar).

By so holding, this Court was safeguarding the "paramount and exclusive jurisdiction" of the Bankruptcy Court which it has never impaired, but has always supported and affirmed, in the long history of bankruptcy law.

CONCLUSION.

For the reasons indicated in this Petition, and in the Petition in Docket No. 445, it is plain, we submit, to anyone who reads the Court of Appeals' opinion that it rends asunder the entire fabric of bankruptcy law. The words "paramount" and "exclusive", when applied to the word "jurisdiction" in relation to bankruptcy, leave no room for the doctrine that the District Court retains "discretionary powers" to defeat such paramount and exclusive jurisdiction in bankruptcy by abdicating its functions in favor of the State Court.

In the case at bar, it appears that the bankruptcy creditors are permanently injured by the final decree appealed from. It leaves the bankruptcy creditors of George R. Joslyn with bankruptcy claims still admittedly unpaid in the Bankruptcy Court, which will never be paid if the Writ sought does not issue and the Court of Appeals' decision is not reversed.

It is submitted that the foregoing constitutes such a grave departure by the Court of Appeals and the District Court from the accepted and usual course of bankruptcy proceedings as to justify and require the allowance of the Writ under the powers of supervision by this Court.

The decision of the lower courts in this case constitutes a precedent seriously and adversely affecting the future administration of all bankruptcy proceedings.

The Writ of Certiorari should issue as prayed in this Petition.

Respectfully submitted,

.....

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.....

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Office - Supreme Court, U.S.
FILED
DEC 13 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 445

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

BRIEF OF GEORGE R. JOSLYN IN OPPOSITION TO PETITION FOR CERTIORARI.

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To the Honorable Justices of the Supreme Court of the United States:

The "Summary Statement" in the petition is misleading and incorrect.

The assertion:

> "The petitioner is a large creditor in the bankruptcy proceeding (Tr. 68, 142, 381)."

is untrue. The "Elks" is not a creditor of the bankruptcy estate.

Counsel's reference (Tr. 68) is to a petition of George

R. Joslyn filed June 30, 1950, offering to pay everything in full. The text does not state that the Elks is a creditor of the bankruptcy estate (Tr. 68).

Transcript page 381 does not indicate the Elks is a creditor.

Counsel's reference (Tr. 142) is to the referee's report. It does not state that the Elks is a creditor of the bankruptcy estate. The referee found the Elks had not proved a claim (Tr. 170-173).

As to which creditors of the bank had provable claims, the referee in said report held:

> "It appears that under Illinois law, the bankrupt is liable only for the debts of the bank that accrued while he was a stockholder, and only to creditors whose claims accrued during that period" (Tr. 170).

Section 6 of Article XI of the Illinois Constitution of 1870 to which the referee refers provided:

> "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, *for all its liabilities accruing while he or she remains such stockholder.*" Ill. R. S. 1951, St. Bar Ed., Page 20. (Emphasis added.)

NOTE: Bank stockholders' liability has since been abolished in Illinois. See Appendix page 16, *infra.*

The referee found that neither the Elks nor any other bank creditor either by pleading or by proof had shown a provable claim:

> "neither the pleadings, the claims filed herein, nor the evidence received in the hearings before the undersigned establish that any of the claimants in the instant bankruptcy proceeding, including Hillmer and the Elks, became creditors of the bank in the period of February 10, 1932, to June 25, 1932, when the bank-

rupt, George R. Joslyn, owned stock thereof. In fact, the petition to intervene indicates that the Elks became creditors of the bank in a different period" (Tr. 173).

All the referee's findings were adopted by the Judge (Tr. 384-385). The finding that the Elks proved no claim either by pleading or by evidence was not contested in the Court of Appeals. The evidence on which the referee based his finding is not in the printed record.

A Chronological statement follows:

On February 10, 1932, George R. Joslyn acquired 1142 shares of Chicago Bank of Commerce par value of $57,-100.00 (Tr. 372). On June 25, 1932, the bank failed. Armin F. Hillmer, *et al.*, filed a class suit on behalf of all the bank's creditors, Cause No. 560305 in the Superior Court of Cook County, Illinois, against the stockholders including Joslyn (Tr. 372-373). The court in 1932 appointed a receiver to receive funds from stockholders. It enjoined the other creditors from suing the stockholders (Tr. 372-373). The Elks received its share of the distributions in said proceeding as a member of the class (Tr. 375).

On February 27, 1936, George R. Joslyn filed a petition in bankruptcy. He did not schedule his interest in two family trusts created by his mother and father August 14 and 15, 1935 (Tr. 372). He was discharged on June 29, 1936 (Tr. 371-372). On May 20, 1946, the court reopened the bankruptcy (Tr. 372).

The only undischarged claim was stockholder's liability upon 1142 shares of $50 par value—$57,100 (Tr. 374-375).

On May 22, 1946, Armin F. Hillmer filed a class claim for $57,100.00 and interest as a representative of all creditors of Chicago Bank of Commerce (Tr. 3-4).

The Honorable Elwyn R. Shaw dismissed the entire proceeding. The Court of Appeals (*In re Joslyn's Estate,*

January 4, 1949, 171 F. 2d 159) reversed Judge Shaw's order.

On March 31, 1949, Wade Fetzer, *et al.,* stockholders of the defunct bank who had overpaid their stockholders' liability, petitioned for leave to intervene in the bankruptcy. The court at the same time granted leave to J. A. Whalen, Receiver, appointed in said Cause No. 560305 to be made a party (Tr. 47). On May 5, 1949, the Honorable Elwyn R. Shaw dismissed a suit brought by Young trustee herein against the trustees of the Joslyn family trusts (Tr. 380).

The Court of Appeals in *Young* v. *Handwork,* 179 F. 2d 70, reversed Judge Shaw's order.

On June 30, 1950 George R. Joslyn filed a petition offering to pay his liability upon the 1142 shares and all fees, in full. He asked that the court fix the amounts (Tr. 128-9). He proposed to pay everything (Tr. 71-2). The district judge on June 30, 1950, referred the petition to the referee (Tr. 67). The referee found:

a. The petition was filed in good faith (Tr. 149).

b. A proposal to pay all claims was a proposal to which valid objection could hardly be made (Tr. 150).

c. Thomas H. Fisher, attorney for the Elks, was planning to file a lien and claim any moneys paid to Young trustee in advance of adjudication of the amounts to be paid. Young in one of his briefs filed with the Referee stated that Charlotte C. Joslyn was alleged to have "an equitable lien or other claim to part of the bankruptcy estate." In Young's brief, Fisher was alleged to have a "derivative interest in Mrs. Joslyn's claim" (Tr. 154).

The referee concluded that the only way to avoid resumption of pending litigation as well as additional litigation of extraneous nature was to grant the request of the bankrupt (Tr. 154).

The Referee recommended as the most feasible method of establishing the bankrupt's liability on the 1142 shares that the parties be ordered to proceed against the bankrupt in Case No. 560305, *Hillmer* v. *Chicago Bank of Commerce,* pending in the Superior Court of Cook County, Illinois (Tr. 176-177).

The evidence and the accounting had already been taken in the said class suit No. 560305 (Tr. 176).

The Referee's report of 78 pages was filed March 16, 1951 (Tr. 128-183).

Young on April 13, 1951, filed 15 pages of objections to this report (Tr. 227-240). The Elks on April 13, 1951, adopted Young's objections (Tr. 222-27). Armin F. Hillmer, the representative of all the bank creditors, concurred in the report except insofar as it recommended that the matter be sent to the state court for determination (Tr. 225-6).

On April 20, 1951, Armin F. Hillmer withdrew his objection (Tr. 241). The intervening stockholders filed no objections. The state-court receiver, Luke F. Cunniff, successor to J. A. Whalen who was a party (Tr. 47) filed no objections. The Honorable Michael L. Igoe took the cause under advisement upon the objections of Young and of the Elks on April 20, 1951 (Tr. 242).

On July 12, 1951, while the court had under advisement the report of the referee, M. L. Joslyn, the bankrupt's father, filed a petition in the Superior Court in the cause of *Hillmer* v. *Chicago Bank of Commerce,* No. 560305. He offered to pay the liability upon the 1142 shares (Tr. 246).

On July 18, 1951, the court adjudicated the liability to be $57,100.00 and directed that the $57,100.00 be paid to Luke F. Cunniff, the successor receiver. M. L. Joslyn paid the $57,100.00 into court. The court by its decree discharged the liability of George R. Joslyn. It restrained all the

creditors of Chicago Bank of Commerce from asserting against George R. Joslyn any liability on account of ownership of the 1142 shares. It ordered Luke F. Cunniff to execute a release (Tr. 350-353).

On July 19, 1951, Luke F. Cunniff, the successor receiver, released George R. Joslyn from all liability on account of the 1142 shares (Tr. 247-248).

On September 13, 1951, in said proceeding the Elks by John S. Miller, Thomas H. Fisher, and Norman Crawford, its attorneys, presented a petition to the Superior Court in the cause of *Hillmer* v. *Chicago Bank of Commerce,* No. 560305. It asked that the aforesaid decree of July 18, 1951 be vacated (Tr. 289-310).

On September 20, 1951, the Superior Court found the Elks' petition to be without merit. The court denied leave to file (Tr. 294). At the same hearing on September 20, 1951, the court at the instance of the Elks modified the decree of July 18, 1951, and then decreed as follows:

> "said creditors are individually and severally permanently enjoined and restrained from claiming or asserting in said bankruptcy proceeding (this identical proceeding) that the stockholder's liability of George R. Joslyn by reason of his ownership of 1,142 shares of capital stock of Chicago Bank of Commerce including liability for interest, if any, exceeds the sum of $57,100 heretofore paid to Luke F. Cunniff, Receiver herein, and from claiming or asserting in said bankruptcy proceeding that said stockholder's liability of George R. Joslyn has not been released and satisfied in full pursuant to said order of July 18, 1951, heretofore entered herein" (Tr. 357 to 358).

The three decrees of the state court, namely, the one entered July 18, 1951, and the other two entered September 20, 1951, remain in full force and effect.

I.

HILLMER, ET AL., FILED A CLASS SUIT ON BEHALF OF ALL CREDITORS OF THE CHICAGO BANK OF COMMERCE IN THE STATE COURT ON JUNE 25, 1932. GEORGE R. JOSLYN WAS SERVED WITH PROCESS IN SAID SUIT LONG PRIOR TO THE BANKRUPTCY OF FEBRUARY 27, 1936. THE JURISDICTION OF THE SUPERIOR COURT THUS OBTAINED OVER GEORGE R. JOSLYN WAS NOT SUPERSEDED BY THE BANKRUPTCY. THE SUPERIOR COURT RETAINED JURISDICTION FOR THE PURPOSES OF SAID CLASS SUIT.

A.

The Bankruptcy Act Implicitly Provides That the Intervention of Bankruptcy Shall Not Deprive the State Court in a Pending Suit of Jurisdiction.

U. S. C., Tit. 11, Chap. 3, Sec. 29:

> "§ 11. Suits By and Against Bankrupts. a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge."

In Re Armour (1951, 7 Cir.), 186 F. 2d 503 at 504.

Town of Agawam v. *Connors* (1947, 1 Cir.), 159 F. 2d 360.

II.

THERE IS NO QUESTION HERE OF THE RIGHT OF A COURT IN BANKRUPTCY TO RE-EXAMINE A CLAIM BASED UPON A JUDGMENT IN THE STATE COURT RENDERED AFTER THE INTERVENTION OF BANKRUPTCY. SUCH AUTHORITY, HOWEVER, IS LIMITED TO THE RIGHT OF THE CREDITOR TO SHARE IN PROPERTY IN THE POSSESSION OF THE BANKRUPTCY COURT BEING ADMINISTERED FOR THE BENEFIT OF ALL CREDITORS. EVEN IN SUCH CASES THE ACT EXPRESSLY PROVIDES THAT THE STATE COURT'S JUDGMENT UNDER CERTAIN CIRCUMSTANCES MAY BE BINDING UPON THE BANKRUPTCY COURT FOR THE PURPOSE OF PROVING A CLAIM AGAINST THE PROPERTY BEING ADMINISTERED FOR CREDITORS IN THE BANKRUPTCY COURT.

U. S. C., Tit. 11, Chap. 7, Sec. 103:

> "§ 63. Debts Which May Be Proved. a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments;"

United States v. *Paddock* (1950, 5 Cir.), 180 F. 2d 121 at 123.

III.

THE STATE COURT DECREE OF JULY 18, 1951, AND THE RELEASE EXTINGUISHED GEORGE R. JOSLYN'S LIABILITY UPON THE BANK STOCK. THIS DECREE AND THE RELEASE CONCLUSIVELY BAR THE BANK CREDITORS IN ILLINOIS COURTS. THIS DECREE AND RELEASE ARE EQUALLY CONCLUSIVE IN THIS PROCEEDING.

A.

The Superior Court Decree of July 18, 1951, Discharging George R. Joslyn and Enjoining the Creditors of the Chicago Bank of Commerce From Suing Him, and the Release Executed by the Receiver Pursuant Thereto, Bar Every Creditor of the Bank in the Courts of Illinois From Asserting Against George R. Joslyn Any Claim Based on His Stock Liability.

Groves v. *Farmers State Bank* (1938), 368 Ill. 35, 47-48; 12 N. E. 2d 618.

Decker v. *Domoney* (1944), 387 Ill. 524, 529; 56 N. E. 2d 750.

Babka Plastering Co. v. *City State Bank* (1931), 264 Ill. App. 142 at 153.

Leonard v. *Bye* (1935), 361 Ill. 185, 190, 192; 197 N. E. 546.

Walton v. *Albers* (1942), 380 Ill. 423; 44 N. E. 2d 145.

B.

The District Court Was Bound to Give the Same Full Faith and Credit to the Decree of July 18, 1951, and the Release as Is Given By the Courts of Illinois.

"Title 28 Judiciary and Judicial Procedure.

"S. 1738 State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.

* * * * *

"Such Acts, records and judicial proceedings of copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State, * * * from which they are taken."

In Re Innis (1944, 7 Cir.), 140 Fed. (2d) 479-480.

Dimock v. *Revere Copper Co.* (1886), 117 U. S. 559.

Boynton v. *Ball* (1887), 121 U. S. 457.

IV.

THE DECREE (Tr. 294) OF THE STATE COURT ENTERED SEPTEMBER 20, 1951, DENYING THE MOTION OF ELKS TO VACATE THE DECREE OF JULY 18 IS CONCLUSIVE AGAINST THE BANK'S CREDITORS IN THIS PROCEEDING. THE JUDGMENT ENTERED SEPTEMBER 20, 1951, BY THE STATE COURT ORDERING THAT EACH AND ALL CREDITORS OF CHICAGO BANK OF COMMERCE "ARE INDIVIDUALLY AND SEVERALLY PERMANENTLY ENJOINED AND RESTRAINED FROM CLAIMING OR ASSERTING IN SAID BANKRUPTCY PROCEEDING (THIS PROCEEDING) THAT THE STOCKHOLDERS LIABILITY OF GEORGE R. JOSLYN BY REASON OF HIS OWNERSHIP OF 1142 SHARES OF CHICAGO BANK OF COMMERCE INCLUDING LIABILITY FOR INTEREST EXCEEDS THE SUM OF $57,100.00 HERETOFORE PAID TO LUKE F. CUNNIFF, RECEIVER HEREIN, AND FROM CLAIMING OR ASSERTING IN SAID BANKRUPTCY PROCEEDING THAT SAID STOCKHOLDERS LIABILITY OF GEORGE R. JOSLYN HAS NOT BEEN RELEASED AND SATISFIED IN FULL" (Tr. 357-358) BY THE SAID DECREE OF JULY 18, 1951, IS ALSO CONCLUSIVE AGAINST THE BANK'S CREDITORS IN THIS PROCEEDING.

A.

By Illinois Law Said Decree of September 20, 1951 (Tr. 294), and the Injunction Order of the Same (Tr. 357-358) Day Conclusively Bar Each and Every Creditor of the Chicago Bank of Commerce From Asserting in the Courts of Illinois Any Claim Upon George R. Joslyn's Stock Liability.

Groves v. *Farmers State Bank* (1938), 368 Ill. 35, 47-48; 12 N. E. 2d 618.

Decker v. *Domoney* (1944), 387 Ill. 524, 529; 56 N. E. 2d 750.

Babka Plastering Co. v. *City State Bank* (1931), 264 Ill. App. 142 at 153.

Leonard v. *Bye* (1935), 361 Ill. 185, 190, 192; 197 N. E. 546.

Walton v. *Albers* (1942), 380 Ill. 423; 44 N. E. 2d 145.

B.

U. S. District Court Was Bound to Give the Same Full Faith and Credit to Said Decree of September 20th and the Injunction Order of the Same Day as Said Decree and Order Would Have By Law and Usage in the Courts of Illinois.

"Title 28 Judiciary and Judicial Procedure.

"S. 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.

* * * * *

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Goldfarb v. *Wright* (1943, 2 Cir.), 135 Fed. (2d) 188, 191.

In Re Devereaux (1935, 2 Cir.), 76 Fed. (2d) 522, 523.

Walters v. *Wilson* (1944, 9 Cir.), 142 Fed. (2d) 59, 60.

Hobbs v. *Franklin Jewelry Co.* (1942, 5 Cir.), 131 Fed. (2d) 432.

V.

THE BANK HAD GONE INTO LIQUIDATION UNDER SECTION 11 OF ILLINOIS STATE BANKING ACT. THERE WAS NOT SUFFICIENT TO PAY CREDITORS IN FULL. THE $57,100.00 STOCK LIABILITY OF GEORGE R. JOSLYN WAS FOR EQUAL AND RATABLE SECURITY OF ALL BANK CREDITORS WHOSE CLAIMS ACCRUED BETWEEN FEBRUARY 10 AND JUNE 25, 1932, WHILE HE WAS A STOCKHOLDER. THE REFEREE CORRECTLY HELD (Tr. 175-6) THAT A SINGLE CREDITOR OR GROUP OF CREDITORS COULD NOT APPROPRIATE THE SECURITY TO THE EXCLUSION OF THE OTHERS.

Zimmerman v. *Ziemer* (1936), 363 Ill. 220, 1 N. E. 2d 854.

Eames v. *Doris* (1882), 102 Ill. 350, 357.

Ill. R. S. 1951, Chap. 16½, Sec. 11, page 254:

> "S. 11. When any banking association, organized under this Act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders * * * may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank * * * may have been located or established.
>
> "The court in which such suit is instituted may appoint a receiver * * * for the purpose of collecting, receiving, and disbursing the amounts due from the stockholders on account of their ownership of the stock of said bank.
>
> "The funds so collected, after the payment of the costs and expenses of collection, including solicitors' fees, shall be distributed according to law among the creditors of said bank in such manner as the court shall direct."

The attention of the court is respectfully called to the analysis and conclusion of Referee Austin Hall (Tr. 175-176).

VI.

IF WE DISREGARD FOR PURPOSE OF ARGUMENT THE FACT THAT GEORGE R. JOSLYN'S OBLIGATION WAS FOR THE EQUAL AND PRO RATA SECURITY OF ALL DEBTS WHICH ACCRUED AGAINST THE BANK BETWEEN FEBRUARY 10 AND JUNE 25, 1932, THEN HILLMER, ET AL., BY INSTITUTING THE CREDITORS BILL ON JUNE 25, 1932, AND PROCURING AN ORDER APPOINTING A RECEIVER AND RESTRAINING OTHER CREDITORS FROM SUING, EFFECTED AN EQUITABLE ATTACHMENT ON THE $57,100.00 STOCK LIABILITY. THIS EQUITABLE ATTACHMENT CONSTITUTED A PRIOR LIEN UPON THE $57,100.00 STOCK LIABILITY IN FAVOR OF BANK CREDITORS WHO CLAIM THROUGH SAID SUIT OVER BANK CREDITORS CLAIMING OTHER THAN THROUGH SAID SUIT.

A.

Hillmer, et al., Effected an Equitable Attachment on George R. Joslyn's $57,100.00 Liability in Favor of Bank Creditors Claiming Through the Creditors' Suit as Against Other Creditors of Said Bank Claiming Said Funds Other Than Through the Said Class Suit.

Thebus v. *Smiley* (1884), 110 Ill. 316 at 319-320.
Sanders v. *Merchants State Bank* (1932), 349 Ill. 547 at 553-4; 182 N. E. 897.

B.

Having Effected an Equitable Attachment of the $57,100.00 Stock Liability More Than Four Months Before the Bankruptcy, Hillmer, et al., as Representatives of the Class Had a Prior Right to the $57,100.00 Over Other Bank Creditors Claiming Said Fund Other Than Through Said Creditors Class Suit.

Section Sixty-Seven (U. S. Code, Title 11, Chap. 7, Sec. 107):

"67. Liens * * *. a. (1) Every lien against the property of a person obtained by attachment, judg-

ment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy * * * shall be deemed null and void * * *."

Metcalf v. *Barker* (1902), 187 U. S. 165; 23 S. Ct. 67, 47 L. Ed. 122.

Straton v. *New* (1931), 283 U. S. 318; 51 S. Ct. 465, 75 L. Ed. 1060.

Emil v. *Hanley* (1943), 318 U. S. 515; 87 L. Ed. 954.

Collier on Bankruptcy, Vol. I, Sec. 2.63, p. 297,

"where attachments are made more than four months before the filing of the petition, the subsequent prosecution of the claim to judgment and sale will not be enjoined because the lien arises at the time of the original attachment. A similar rule has been established with respect to proceedings to enfore an equitable lien, such as the filing of a creditor's bill usually creates, effected prior to the four-month period."

CONCLUSION.

Every claim against the bankruptcy estate has been discharged in full. The only remaining item is the spurious claim of the attorneys for the Elks upon the two assignments of alimony (Tr. 370). This claim has been adjudicated to be grossly fraudulent by the courts of Illinois. (*Joslyn, Fisher Assignee,* v. *Joslyn,* 337 Ill. App. 443, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV.) The referee correctly held (Tr. 154) that to keep the bankruptcy open for the purpose of permitting the attorneys for the Elks to harass the bankrupt with the assistance of the bankruptcy trustee would be improper under the law. The district judge correctly held that the bankruptcy should not be kept open for the perpetuation of the gross abuse of court process carried on by the attorneys for the Elks.

The court is respectfully referred to the findings in *Joslyn, Fisher assignee,* v. *Joslyn,* 337 Ill. App. 443; 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV, where the court found that the prosecution of this bankruptcy proceeding was inseparably connected with the divorce and a myriad of other litigation instituted by the attorneys for the Elks against George R. Joslyn. It is respectfully submitted that the Petition for Certiorari should be denied.

ALVIN GLEN HUBBARD,
REESE HUBBARD,
DOMINICK VARRAVETO, JR.,
Counsel for Respondent,
George R. Joslyn.

APPENDIX.

Stockholders' liability on bank stock has been abolished in Illinois. Amendment of the Constitution was approved by the voters at the last election.

Section 6 of Article XI of the Illinois Constitution now reads:

> "No stockholder of a banking corporation or institution shall be individually responsible or liable to its creditors for the liabilities of such banking corporation or institution under any constitutional or statutory provisions heretofore creating or declaring such stockholder responsibility or liability, provided, however, that any rights of creditors existing at the date of the adoption hereof shall not be impaired hereby, provided that action to enforce such stockholder responsibility or liability with respect to any existing bank liability which is payable on demand or for which a cause of action has already accrued shall be commenced within one year from the date of the adoption hereof, and with respect to any other existing bank liability shall be commenced within one year from the time when the cause of action therefor first hereafter accrues against such banking corporation or institution, or could so accrue by demand. No law creating or declaring any such stockholder responsibility or liability shall be passed.
>
> "Adopted by the House, June 19, 1951, by a two-thirds vote.
>
> "Concurred in by the Senate, as amended, June 27, 1951, by a two-thirds vote." (Laws of Illinois, Sixty-seventh Gen. Assembly 1951, page 2140).

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IN THE

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OCTOBER TERM, 1952.

No. 445

IN THE MATTER OF

GEORGE R. JOSLYN,

BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE R. JOSLYN, ET AL.,

Respondents.

ON PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

EDWARD J. METZDORF,
231 South La Salle Street,
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Pro se and as Attorney for Wade Fetzer, Jr., et al.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The opinion of the District Court (Tr. 365-371) is reported in 102 F. Supp. 521. The opinion of the Circuit Court of Appeals for the Seventh Circuit (Tr. 511-12) is reported in 198 F. (2d) 673.

JURISDICTION.

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED.

1. Whether the Superior Court of Cook County, Illinois, had jurisdiction to enter the decree of July 18, 1951, and if it did, whether that decree and its satisfaction extinguished the provable claims in bankruptcy arising out of the stockholder's liability of the bankrupt.

2. Whether the District Court violated any provision of the Bankruptcy Act by not reducing to its possession administrable assets of the bankrupt's estate when there were no provable claims in bankruptcy.

STATEMENT.

Respondents, Wade Fetzer, Jr., Margaret Fetzer, Frank D. Hurt, J. A. O. Preus, Charlotte M. Zander and Henry G. Zander, Jr., as Trustees under the Will of Henry G. Zander, deceased, Mutual Trust Life Insurance Company, Raymond Olson and The First National Bank of Chicago, as Executors of the Estate of Edwin A. Olson, deceased, Raymond Olson, O. D. Olson, O. D. Olson, Jr., Arthur E. Kesler, Edwin Carson, Clara Carson, Olaf Olson, Ida M. Olson, George E. Q. Johnson, Jr., as Executor of the Estate of George E. Q. Johnson, deceased, E. H. Neese, H. C. Freeman, R. E. Freeman, A. R. Dahms, H. A. Von Oven and G. A. Macklem, hereinafter referred to as the "intervenors," were stockholders of the Chicago Bank of Commerce, an Illinois state bank (Tr. 189-202). The bank failed on June 6, 1932, and a class action was instituted in the Superior Court of Cook County, Illinois, by Hillmer, *et al.*, on behalf of all creditors of the bank to enforce the lia-

bility of the stockholders to the creditors as provided by the statutes and Constitution of Illinois. George R. Joslyn, one of the stockholders, was named as a defendant in this class action and served with process. He pleaded his discharge in bankruptcy (Tr. 354-356). Intervenors were also defendants in the stockholders' liability case.

There was erroneously collected from intervenors amounts in excess of their true liability. These amounts were distributed to the creditors of the bank, including petitioner (Tr. 96, 146). Subsequently, upon a class petition filed by intervenors and proceedings thereon a decree was entered in the stockholders' liability case adjudicating that intervenors and the class represented by them were entitled to a refund in the amount of $145,636.56 by reason of their overpayments (Tr. 187-211). By that time there were insufficient funds in the stockholders' liability receivership estate to pay intervenors' claim in full (Tr. 212-218).

In the interim petitioner succeeded in opening the bankruptcy estate of George R. Joslyn because the bankrupt had failed to schedule the correct parties and because certain beneficial interests of the bankrupt not subject to the claims of the creditors under local law were held to be assets administrable in bankruptcy (Tr. 372). At the time of the reopening of the bankruptcy proceeding, however, the petitioner obtained a restraining order in the bankruptcy court prohibiting anyone from proceeding against the bankrupt on his stockholder's liability (Tr. 98, 250).

Intervenors, precluded from seeking contribution directly from the bankrupt by reason of petitioner's restraining order, sought to intervene in the bankruptcy case to obtain contribution for the balance due them by way of subrogation (Tr. 92-101). The trustee in bankruptcy, who was nominated by petitioner (Tr. 105), opposed inter-

venors' claim for contribution and asserted a counterclaim for the benefit of all creditors of the bankrupt on the ground that intervenors had already been fully repaid (Tr. 107-117). This counterclaim was rejected by the referee to whom the matter had been referred (Tr. 177). The referee was unable to ascertain from the record before him what creditors had provable claims against the bankrupt by reason of the stockholders' liability and recommended that the parties proceed against the bankrupt in the stockholders' liability case (Tr. 176-177). While the matter was pending on consideration of the referee's report, the father of the bankrupt filed a petition in the stockholders' liability case offering to pay the bankrupt's liability in full if it were promptly adjudicated (Tr. 246-7). This was done by the Superior Court decree of July 18, 1951 (Tr. 348-353).

The Superior Court decree of July 18, 1951, and its satisfaction of record extinguished the claim against the bankruptcy estate arising out of Joslyn's stockholder's liability. There were no longer any creditors of the bankrupt, and the bankruptcy court refused to allow the trustee in bankruptcy to seize assets of the bankrupt when there were no provable claims against the bankrupt. As a result of the payment by Joslyn's father of his son's liability in the state court case enough funds were brought into the state court receiver's possession to enable him to repay the balance due the overpaying stockholders. The state court receiver was ordered to pay the balance due to intervenors. Out of this latter payment the receiver was directed to pay to intervenors' attorneys, as fees, a portion of their recovery, in accordance with prior orders. This payment of attorneys' fees was out of intervenors' own funds to their own attorneys for effecting recovery of their overpayments (Tr. 260-267).

ARGUMENT.

I.

THE DECISION BELOW IS CORRECT.

(a)

The Superior Court Had Jurisdiction to Enter the Decree of July 18, 1951.

The entire argument of the petitioner is bottomed on the proposition that the state court decree of July 18, 1951, was a nullity. This proposition is false.

The stockholder's liability of George R. Joslyn was created by the Illinois Constitution and the Illinois Banking Act (Constitution of Illinois, Art. XI, sec. 6; Smith-Hurd Ill. Anno. Stats. Ch. 16½, sec. 11). The Illinois Banking Act provides that the liability may be enforced in a class action. The state court proceeding was a class action to enforce this liability. A class action is the proper means of enforcing the constitutional and statutory liability of stockholders of an Illinois state bank (S. H. A. Chap. 16½, sec. 11; *Golden* v. *Cervenka*, 278 Ill. 409, 435, 116 N. E. 273, 284; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 153-4, cert. denied, 266 Ill. App. XV). In such a class action all of the parties constituting the class are as much before the court as the named parties and are equally bound by any order or decree entered in the suit (*Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 153, cert. denied, 266 Ill. App. XV; *Groves* v. *Farmers State Bank*, 368 Ill. 35, 48, 12 N. E. (2d) 618, 624; *Leonard* v. *Bye*, 361 Ill. 185, 190, 196 N. E. 546, 548). Unless all parties represented are deemed to be before the court it would be impossible to maintain representative suits under

any circumstances (*Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363-364; *Smith, et al.* v. *Swormstedt*, 16 How. 288, 302-3; *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, 672-674). Petitioner, whose only claim against the bankrupt arose from the fact that petitioner had a claim against the Chicago Bank of Commerce at the time the bank failed and, therefore, had a claim against Joslyn to enforce his stockholder's liability, was bound by all orders and decrees in the state court suit.

The Superior Court had jurisdiction of the subject matter in the class suit brought by Hillmer. The Superior Court also had jurisdiction over the person of George R. Joslyn for George R. Joslyn appeared in the case and filed an answer (Tr. 186, 354-356). Since the Superior Court had jurisdiction of the subject matter and of the parties its decree of July 18, 1951, was valid and binding upon all the parties, notwithstanding the bankruptcy of George R. Joslyn (*Eyster* v. *Gaff*, 91 U. S. 521, 524-526; *Davis* v. *Friedlander*, 104 U. S. 570, 574; *Dimock* v. *Revere Copper Company*, 117 U. S. 559, 564-566).

Where a state court has jurisdiction of the subject matter and parties, as here, such jurisdiction is not divested merely by maintenance of a bankruptcy proceeding to which the defendant is a party (*Peck* v. *Jenness*, 7 How. 612; *Connell* v. *Walker*, 291 U. S. 1, 5). In *Eyster* v. *Gaff*, 91 U. S. 521, 524, this court said:

> "It is a mistake to suppose the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition."

A discharge in bankruptcy is neither a payment nor an extinguishment of a debt. The discharge affects only the remedy of the creditor. The obligation is not canceled

(*Zavelo* v. *Reeves*, 227 U. S. 625, 629; *Boynton* v. *Ball*, 121 U. S. 457, 467).

When George R. Joslyn pleaded his discharge in bankruptcy in the state court case (Tr. 354-6) he raised this bar. But the pleading of this defense did not deprive the state court of jurisdiction over him on the issue as to his stockholder's liability. This step in the pleadings merely prevented the state court from entering a judgment against the bankrupt until the question of his discharge was determined by the state court (*Boynton* v. *Ball*, 121 U. S. 457, 466-7). Thereafter the bankrupt was free to waive the defense of discharge or renew the debt by a new promise. The intent to do either could be inferred by his silence when his father offered to pay the liability if it were promptly adjudicated (*In re Dimock* v. *Revere Copper Company*, 117 U. S. 559, 566; *In re Innis* (C. C. A. 7), 140 F. (2d) 479, 481, cert. denied, 322 U. S. 736). The Superior Court had jurisdiction to proceed with the adjudication when the father presented his petition because the right of Hillmer, et al. to prosecute their suit against George R. Joslyn having once attached could not be taken away by proceedings in another court (*Peck* v. *Jenness*, 7 How. 612; *Metcalf* v. *Barker*, 187 U. S. 165, 175).

The Superior Court decree of July 18, 1951, was not a violation of the exclusive jurisdiction of the bankruptcy court because the Superior Court decree did not adjudicate a claim against the bankrupt's estate. The stockholders' liability of the bankrupt adjudicated under the decree of July 18, 1951, was a personal liability. The bankrupt waived his defense of discharge in bankruptcy to this liability. When the stockholder's liability was adjudicated by the decree the liability merged in the decree and when the decree was satisfied in open court the decretal liability was extinguished.

The liability of the bankrupt to the creditors of the Chicago Bank of Commerce arising out of the bankrupt's ownership of stock in the bank did not bear interest. The liability was created by the Constitution and the Banking Act of Illinois (*Golden* v. *Cervenka*, 278 Ill. 409, 418, 116 N. E. 273, 278). The maximum amount for which a stockholder of an Illinois State Bank may be held liable to the creditors of the bank is fixed by the face amount of the shares which he owns (*Heine* v. *Degen*, 362 Ill. 357, 199 N. E. 832; *Sanders* v. *Merchants State Bank of Centralia*, 349 Ill. 547, 182 N. E. 897). The Illinois law does not allow interest prior to a decree (*Munger* v. *Jacobson*, 99 Ill. 349, 354; *Lewis* v. *West Side Trust and Savings Bank*, 376 Ill. 23, 45-7, 32 N. E. (2d) 907, 918-919). It is only where equitable considerations are shown to warrant the imposition of interest that interest may be allowed in addition to the stockholder's liability (*Cohen* v. *North Avenue State Bank*, 291 Ill. App. 558, 570-1, 10 N. E. (2d) 823, 827-828). The Superior Court decree of July 18, 1951, was an adjudication that no interest should be imposed.

The state court had jurisdiction of the subject matter and the parties. Petitioner and all other creditors of the bank were bound by their class representation in the Superior Court. If petitioner believed itself improperly represented in that case, petitioner was at liberty to apply to that court to make suggestions concerning the carriage and conduct of that case (*Cockburn* v. *Thompson*, 16 Vesey Jr. 325, 33 Eng. Rep. 1005). Petitioner was also at liberty to appeal from the decree of July 18, 1951, which petitioner has done (pending in Illinois Appellate Court for the First District as Docket No. 45722).

In the proceeding before the referee in bankruptcy the referee found that neither petitioner nor the trustee in bankruptcy had offered any evidence as to equitable con-

siderations warranting the imposition of interest in addition to the stockholder's liability (Tr. 157).

The federal rule in bankruptcy relating to the accrual of interest on claims is inapplicable. The stockholder's liability of Joslyn was merged in the decree of July 18, 1951. That decree was satisfied of record by the father's payment (Tr. 376-7). Thereafter there was no basis for a claim against the bankruptcy estate by creditors of the Chicago Bank of Commerce because the bankrupt was no longer liable to the creditors of that bank.

(b)

The Contention That All of the Assets of the Bankrupt Should Have Been Delivered Into the Possession of the Trustee in Bankruptcy Raises Only a Moot Question When There Are No Creditors.

When the liability of the bankrupt to the creditors of the Chicago Bank of Commerce was extinguished by the father's payment of his son's liability there were no creditors with provable claims against the bankruptcy estate. There were no other claims (Tr. 380). It would serve no useful purpose to bring all of the assets of the bankrupt into the possession of the trustee in bankruptcy. The issue before the bankruptcy court had become moot except for the payment of attorneys' fees and their expenses. The decree of the District Court providing for a fund of $50,000.00 was ample to take care of all attorneys' fees and disbursements in a controversy which itself involved only $57,100.00. Courts do not perform autopsies on dead issues (*U. S.* v. *Alaska S. S. Co.*, 253 U. S. 113, 116; *U. S.* v. *Hamburg-American Co.*, 239 U. S. 466, 475).

II.

THERE IS NO CONFLICT OF DECISIONS INVOLVED, NOR ANY QUESTION OF GENERAL IMPORTANCE, NOR ANY OTHER REASON FOR THIS COURT TO REVIEW THE DECISION BELOW.

No conflict of decision is presented by the petitioner. Nor was there any departure by the court below from the decisions of this court with regard to the exclusive jurisdiction of a bankruptcy court over bankruptcy matters. The payment of the bankrupt's stockholder's liability in the stockholders' liability case by the father with the father's funds did not involve assets of the bankruptcy estate. When that payment was made the liability was extinguished. When the liability was extinguished there could no longer be any claim against the bankrupt's estate arising out of that liability.

The facts involved in this case are peculiar (see *Joslyn* v. *Joslyn,* 337 Ill. App. 443, 457, 86 N. E. (2d) 367, 374, referred to in the opinion of the court below (Tr. 424)). The case presents no question of general interest. If the decision below were in error there is still no warrant for its review by this court. The only effect of a reversal would be to place in the hands of the trustee in bankruptcy the bankrupt's interest in certain trust estates to be used for the payment of the bankrupt's stockholder's liability, which has already been paid. The reversal would deprive intervenors of their reimbursement while permitting petitioner to retain the benefits of intervenors' overpayment and at the same time participate in the recovery of the stockholders' liability from the bankruptcy estate.

Petitioner complains of the fact that both courts below emphasized the seemingly endless character of this litigation. Petitioner disclaims any responsibility for its length.

An examination of *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 457, 86 N. E. (2d) 367, 374, will disclose the genesis of this litigation and the desirability of its interment.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for certiorari be denied.

Respectfully submitted,

EDWARD J. METZDORF,
Pro se and as counsel for Wade Fetzer, Jr., et al.

December, 1952.

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BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

KARL EDWIN SEYFARTH,
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Armin F. Hillmer.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition correctly states that the opinions of the lower courts are reported in 198 F. (2d) 673 and 102 F. Supp. 521. They are also to be found in the Transcript of Record at pages 422-27, 511-12 and 365-71. Accuracy, however, requires that petitioner's Summary Statement of Matters Involved be corrected and supplemented in certain respects.

Statement—Corrections and Additions.

Petitioner claims to be "a large creditor in the bankruptcy proceeding" (Pet. 3).

The fact is that petitioner was a depositor in the Chicago Bank of Commerce, an Illinois bank which failed in 1932 (R. 375, 382), and, under Illinois law, had a claim against the stockholders of said bank, which included George R. Joslyn (R. 423). The liability of said stockholder was subsequently satisfied and released in the manner hereinafter described, and petitioner's present claim to being a creditor of the bankrupt is based upon the erroneous assumption that said satisfaction and release were void and of no legal effect. This error is the premise upon which petitioner predicates its right to review herein.

At the time the Chicago Bank of Commerce failed, the Illinois law made stockholders in state banks liable to creditors thereof in an amount equal to the par value of shares held by said stockholders (Ill. Constitution Art. XI, § 6; Ill. Rev. Stat. Chap. 16½, § 6). The par value of stock issued in the name of George R. Joslyn was $57,100 (R. 365-6, 67-8), and petitioner now admits that "there is no issue respecting the principal amount of that liability" (Pet. 4).

On June 25, 1932, long prior to the bankruptcy proceeding herein, this respondent, Armin F. Hillmer, and other creditors of the Chicago Bank of Commerce filed a class suit in the Superior Court of Cook County, Illinois, on behalf of all creditors, which included petitioner herein (R. 423, 425), against the stockholders to enforce the constitutional and statutory liability of said stockholders to the creditors of said bank (R. 372-3, 94-5). George R. Joslyn was made a party to said suit and filed his answer therein (R. 373).

On February 27, 1936, George R. Joslyn filed his petition in bankruptcy herein (R. 2).

Thereafter, on July 12, 1951, Marcellus L. Joslyn, the father of the bankrupt, who was also a defendant in the action to enforce stockholders' liability, petitioned the Superior Court of Cook County, Illinois, to adjudicate the liability of the bankrupt and to permit said petitioner to pay the same (R. 245-6). Thereafter, the state court entered an order fixing the liability at $57,100, accepted said sum from the father of the bankrupt, and satisfied the liability of George R. Joslyn to the creditors of the Chicago Bank of Commerce (R. 348-53). In due course the receiver in said cause issued a release to the bankrupt (R. 247-8).

The District Court, in which the bankruptcy was pending, was of the opinion that "the satisfaction of the bankrupt's stockholders' liability by a payment of the sum of $57,100 by Marcellus L. Joslyn and the disclaimer aforementioned by the other two creditors leave this court with a bankruptcy case without creditors or claimants except for fees, costs and expenses arising out of the proceedings herein" (R. 380, 368, 383). Accordingly, on November 8, 1951, the District Court entered a decree modifying and vacating certain orders, directing the dismissal of litigation instituted by the trustee, directing the bankrupt to pay certain costs and expenses, and reserving jurisdiction of the bankrupt for the purpose of adjudicating and enforcing claims for fees, costs and expenses in the bankruptcy proceeding (R. 384-6, 3). Upon appeal, the United States Court of Appeals for the Seventh Circuit affirmed this action of the trial court (R. 422-6, 511-12).

Question Presented.

The question thus presented is whether the state court had *jurisdiction* in the stockholders' liability suit to adjudicate and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. If the Illinois court had jurisdiction, then the liability of the bankrupt has been satisfied by payment, and petitioner herein—as well as all other depositors of the Chicago Bank of Commerce—has ceased to be a creditor of the bankrupt.

Numerous other questions stated by petitioner and sought to be injected as issues herein (Pet. 9-10), are either nonexistent or irrelevant so far as this respondent is concerned.

No Grounds Exist for Allowance of Certiorari.

Petitioner urges two reasons for allowing the writ herein: (1) that the court below decided federal questions in conflict with applicable decisions of this court, and (2) that the court below has sanctioned such a departure from accepted and usual bankruptcy procedure as to require supervision thereof by this court (Pet. 10). Neither of these contentions is supported by the record herein.

ARGUMENT.

In this case the petitioner is seeking to keep alive a bankruptcy proceeding in which the bankrupt is *solvent* and in which there are no creditors or claimants. Both lower courts have held that the bankruptcy proceeding should be terminated after payment of fees, costs and expenses of litigation.

This court has repeatedly declared that the issuance of writs of certiorari "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton Brown Shoe Co.* v. *Wolf*, 240 U. S. 251, 258. The record herein does not present a case of such gravity, importance or conflict of decisions as to warrant this court assuming jurisdiction.

I.

NO CONFLICT OF DECISION IS INVOLVED.

Although petitioner asserts that the "Court of Appeals has in this cause decided federal questions in a way in conflict with applicable decisions of the Supreme Court" (Pet. 10), no decisions of other Courts of Appeal or of this court are cited or referred to which conflict with the action of the lower courts herein. The reason is obvious. There are no conflicting decisions and petitioner is in reality seeking a review of the decisions below on the sole ground that they are erroneous. This is not a proper ground for review by certiorari. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163; *General Talk. Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-9.

The foregoing cases should dispose of this matter, but because petitioner has argued at length the *merits* of the action of the lower courts, respondent will consider the same more fully than would otherwise be warranted. In doing so, it is well to remember that the argument of petitioner constitutes a collateral attack on the prior judgment of the state court adjudicating and satisfying the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce.

It is elementary that petitioner could not prevail in a review of the *merits* unless the action of the state court was void *ab initio* for lack of jurisdiction. *Cooper* v. *Reynolds*, 77 U. S. 308, 316; *Holley* v. *General American Life Ins. Co.*, 101 F. (2d) 172, 174 (C. C. A. 8), cert. denied 307 U. S. 615; *Higginson* v. *Schoeneman*, 190 F. (2d) 32, 33-4 (C. C. A. D. C.). Accordingly, the sole question on the merits is whether the Superior Court of Cook County, Illinois, had jurisdiction in the stockholders' liability proceedings to determine and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. To state this question is to suggest the answer.

A. The state court acquired and retained prior jurisdiction over George R. Joslyn and the subject matter of his stockholder's liability.

It has long been established, by statutes and court decisions in Illinois, that the proper method of enforcing the liability of stockholders in Illinois banks is by a class suit for the benefit of all creditors of the bank—of the type instituted by the respondent in the Superior Court of Cook County. *Banking Act of Illinois* (Ill. Rev. Stat. Chap. 16½, § 11); *Heine* v. *Degen*, 362 Ill. 357, 365-6; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 151-3; *Elkin* v. *Diversey Tr. & Svgs. Bank*, 363 Ill. 160, 164-5; *RFC* v.

Central Republic Trust Co., 11 F. Supp. 976, 983-4 (D. C. Ill.).

On July 28, 1932—more than four years prior to the bankruptcy herein—the Superior Court of Cook County proceeded to protect its jurisdiction by appointing a receiver in the Hillmer suit to receive stockholders' liabilities, and by enjoining all creditors from proceeding elsewhere to enforce the liability of the stockholders of said bank (R. 183-6). Said injunction is still in force (R. 350, 95, 97-8).

Both the state court and the trial court herein have found as a *fact* that the Superior Court of Cook County obtained and retained jurisdiction to determine the stockholder's liability of George R. Joslyn (R. 348-53, 375-6). These findings concerning the jurisdiction of the state court are controlling and determinative of the issues herein.

B. The bankruptcy of George R. Joslyn did not destroy the power of the state court to proceed to judgment in the stockholders' liability suit.

The Bankruptcy Act clearly recognizes the *continued* existence of the power of a state court to act during the pendency of bankruptcy proceedings instituted by a defendant. Thus, Section 11(b) of the Act (11 U. S. C. A. § 29) makes provision for a bankruptcy trustee to defend pending litigation—in which event the trustee and estate are bound by the judgment of the state court. *In re McNulty*, 13 F. (2d) 754, 755 (C. C. A. 9).

Section 63(a)(5) (11 U. S. C. A. § 103) authorizes the allowance of claims in bankruptcy on judgments entered in state courts *after* the filing of a bankruptcy petition—which judgments cannot be questioned in the bankruptcy proceedings. *U. S.* v. *Paddock*, 180 F. (2d) 121, 123-4 (C. C. A. 5); *In re Anton*, 11 F. Supp. 345, 347 (D. C. Minn.).

Similarly, and particularly pertinent herein, Section

63(b) (11 U. S. C. A. § 103) expressly authorizes the liquidation of claims against the bankrupt in such manner as the bankruptcy court shall direct. This statutory provision definitely authorizes the liquidation of claims in state court proceedings. *In re Martin,* 228 Fed. 184 (C. C. A. 2); *In re Buchan's Soap Corp.,* 169 Fed. 1017 (D. C. N. Y.).

Except in special situations like agricultural bankruptcies, in which the Act expressly prohibits proceedings in state courts, federal courts have uniformly held that bankruptcy proceedings do not automatically divest a state court of power to act in pending litigation, and that the *jurisdiction* of the state court is not thereby "terminated," "divested," "abated" or "frozen." *Connell* v. *Walker,* 291 U. S. 1, 5-6; *Norton* v. *Switzer,* 93 U. S. 355, 362; *U. S.* v. *Paddock,* 180 F. (2d) 121, 124 (C. C. A. 5); *In re Tinkoff,* 141 F. (2d) 731, 733 (C. C. A. 7). As concisely stated by this court in *Connell* v. *Walker,* 291 U. S. 1 at page 5:

> "Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a non-bankruptcy court, to which the bankrupt is a party."

Decisive of the question here under consideration are the decisions of both this court and lower federal courts which squarely hold that a state court which acquires jurisdiction before the bankruptcy of a defendant therein, retains such jurisdiction, is not deprived thereof by the bankruptcy proceedings, and has power to render a valid and binding judgment *in personam* against the defendant. *Dimock* v. *Revere Copper Co.,* 117 U. S. 559, 564; *In re Innis,* 140 F. (2d) 479, 480-1 (C. C. A. 7), *cert. denied* 322 U. S. 736; *Norton* v. *Switzer,* 93 U. S. 355, 362, 364; *In re Anton,* 11 F. Supp. 345, 346-7 (D. C. Minn.).

In an identical situation in the *Dimock* case, this court said:

> "The Superior Court of Massachusetts had jurisdic-

tion of the suit of the Copper Company against Dimock, both as regards the subject matter and the parties. This jurisdiction was rendered complete by service of process and by the appearance of the defendant. All this was before the beginning of the bankruptcy proceeding. Nothing was done to oust this jurisdiction, and the case accordingly proceeded in due order to the rendition of the judgment which is the foundation of this action. It is not argued that this judgment was void, or that the court was ousted of its jurisdiction by anything done in the bankruptcy court. **No such argument could be sustained if it were made.**" (p. 564.) (Boldface type ours.)

The *Dimock* case was followed by the Court of Appeals for the Seventh Circuit in *In re Innis*, 140 F. (2d) 479, in which the court said:

"As announced in *Dimock* v. *Revere Copper Co.*, 117 U. S. 559, 6 S. Ct. 855, 29 L. Ed. 994, the state court had acquired jurisdiction of the parties and of the subject matter. It was 'competent to administer full justice' and was proceeding according to the law which governed such suits. It was not compelled to take judicial notice of the proceeding in bankruptcy in another court, however seriously that proceeding might affect the rights of the parties to the suit already pending. It was the duty of the state court to proceed to judgment between the parties unless, by some proper pleading, it was informed of the changed relation of any of the parties to the suit's subject matter." (p. 480)

Although petitioner was familiar with the proceedings in the state court, it did nothing to bring the bankruptcy proceeding to the attention of the state court until *after* the satisfaction and release of the liability of George R. Joslyn. Petitioner should not now be heard to complain about this action of the state court.

Subsequent approval by the District Court herein of the action of the state court was tantamount to a direction by the bankruptcy court that the stockholders' liability should

be liquidated in the state court, pursuant to express authorization in the Bankruptcy Act. This action by the federal court conformed to all relevant adjudicated cases and in no way conflicted therewith.

The cases relied on by petitioner in point II are irrelevant and need not be considered herein because they involved proceedings relating to real property (*Isaacs* v. *Hobbs Tie & Timber Co.*), or to enforce liens (*U. S. Fidelity Co.* v. *Bray*), or agricultural bankruptcies, in which the Act specifically prohibits state court proceedings (*Littleton* v. *Kincaid*), or factual situations unlike the situation presented by this record and which are governed by different rules of law (*Pepper* v. *Litton, New York* v. *Saper, Johnson* v. *Norris, Sturges* v. *Crowninshield, International Shoe Co.* v. *Pinkus*).

Since the facts in this case are unlike those involved in any of the cases cited by petitioner, the decision of the lower courts herein does not conflict with said adjudications or furnish the basis for allowing certiorari herein.

II.

THIS RECORD DOES NOT PRESENT A SITUATION OF SUCH GRAVITY OR IMPORTANCE AS TO WARRANT REVIEW BY CERTIORARI.

In an effort to induce the court to review this case, petitioner asserts that the Court of Appeals "has so far sanctioned such a departure by the District Court from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of the Supreme Court's power of supervision" (Pet. 10). The claimed departure consists of (1) the refusal of the bankruptcy court to go through unnecessary motions in administering the assets of a *solvent* bankrupt and (2) the approval of the bankruptcy court of

the action of the state court satisfying the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce.

A. Practice and procedure in bankruptcy relating to solvent estates without creditors is not of general importance.

Respondent believes that the factual situation presented by this record occurs so infrequently—and is so unique—as to take this case out of any classification of general importance. As pointed out by the Court of Appeals, "the controversy on the present appeals presents the *unusual situation* of an adjudicated bankrupt, now fully *solvent* * * *" (R. 424). As described by the trial court, "*this is a bankruptcy case without creditors or claimants*" (R. 368). How unlike this situation are typical bankruptcies involving hopelessly insolvent estates with large numbers of unpaid claimants. The issues herein are not of general importance for nothing which could be decided on a review of the present case would have any bearing in the usual and normal bankruptcy proceeding.

B. No interest was collectible on the stockholder's liability of George R. Joslyn and no question involving interest warrants review by certiorari herein.

Throughout its petition and brief, petitioner asserts that the stockholder's liability of George R. Joslyn bore interest and that the satisfaction of said liability by payment of $57,100 deprived petitioner of interest on its claim in the bankruptcy court.

This argument ignores the basic fact that petitioner's claim against the bankrupt is created by and dependent upon statutory law in Illinois. Thus, at common law, a bank depositor had no claim against the stockholders of the

bank. Petitioner's claim against the bankrupt as a bank stockholder was created and exists only because of constitutional and statutory provisions (*Golden* v. *Cervenka,* 278 Ill. 409, 418) which prescribe the par value of stock as the *maximum* limit of such liability. *Sanders* v. *Merchants State Bank of Centralia,* 349 Ill. 547, 556-7; *Heine* v. *Degen,* 362 Ill. 357, 371-2.

Illinois courts have uniformly held that interest is not a part of stockholders' liability and have consistently declined to assess interest prior to decree. *Hillmer* v. *Block,* 315 Ill. App. 134; *Munger* v. *Jacobson,* 99 Ill. 349, 354; *Lewis* v. *West Side Tr. & Svgs. Bank,* 376 Ill. 23, 45-7; *Cohen* v. *North Ave. State Bank,* 291 Ill. App. 558, 569-70.

So also, interest is of statutory origin in Illinois (Ill. Rev. Stat. 1951, Chap. 74, § 2) and federal courts, including bankruptcy courts, are bound by the Illinois decisions construing the interest statute. *Huddleston* v. *Dwyer,* 322 U. S. 232, 236-7; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 381; *RFC* v. *Goldberg,* 143 F. (2d) 752, 759-61 (C. C. A. 7).

Illinois decisions hold "that there is no liability for interest on stockholders' liability" in banks organized under Illinois law. *Garvy* v. *Wilder,* 121 F. (2d) 714, 716 (C. C. A. 7); *Hillmer* v. *Block,* 315 Ill. App. 134; *Munger* v. *Jacobson,* 99 Ill. 349, 354; *Lewis* v. *West Side Tr. & Svgs. Bank,* 376 Ill. 23, 45-7; *Cohen* v. *North Ave. State Bank,* 291 Ill. App. 558, 569-70.

The argument that petitioner has been deprived of interest on his claim against a solvent bankrupt overlooks the fact that after payment of the stockholder's liability of George R. Joslyn in the state court petitioner has no claim in the bankruptcy court upon which interest could accrue. It certainly does not appear that any question relating to interest is of such gravity as to warrant review by certiorari herein.

CONCLUSION.

This case was properly decided by the lower courts and no adequate ground for certiorari has been presented here. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KARL EDWIN SEYFARTH,
Counsel for Respondent,
Armin F. Hillmer.

20

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JAN 15 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

BRIEF OF GEORGE R. JOSLYN IN OPPOSITION TO PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG FOR CERTIORARI.

ALVIN GLEN HUBBARD,
REESE HUBBARD,
DOMINICK VARRAVETO, JR.,
Counsel for Respondent, George R. Joslyn.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF OF GEORGE R. JOSLYN IN OPPOSITION TO PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG FOR CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

We respectfully refer the court to the Statement of Facts and Propositions of Law in Joslyn's brief No. 445. The purported summary statement in the petition (Pet. 2-11) is incorrect. We respectfully refer the court to the opinion of the district judge (Tr. 365-371) to the Findings of Fact (Tr. 371-381). The testimony is not in the printed record. The findings of the referee (Tr. 127-183) were adopted by the judge (Tr. 384).

Because of his position as bankruptcy trustee, Young has a stay in the Court of Appeals. This stay under Sec. 25 b (U. S. C. Tit. 11, Chap. 4, Sec. 48) is without bond.

The opinion indicates that had the district judge suspected that Young would contrive by appeals with the attorneys for the Elks to keep Joslyn's affairs under the three suits and the injunctions he would have passed upon an application (Tr. 284-288) to remove Young:

> "Other matters, including a motion to remove the Bankruptcy Trustee, were filed in this cause, which need not be passed upon at the present time in order to dispose of this bankruptcy case and the other litigation which has grown out of it.
>
> "There is no conceivable objection to the payment in full of a bankrupt's creditors.
>
> "The payment, satisfaction and release of the stockholder's liability claim and the disclaimer of Marcellus L. Joslyn and Dr. Ralph C. Hamill leave this court with a bankruptcy case without creditors or claimants and with no justifiable reason for holding open this case except for the allowance and payment of claims for fees and expenses." (Tr. 368.)

Young Asserted in the District Court a Purported Equitable Lien Claim.

Young, the trustee, contended in the district court that the estate should be kept open in order that the attorneys for the Elks could assert a lien on the bankruptcy estate through two assignments of alimony and child support. This claim had been adjudicated to be part of a scheme to extort and to blackmail by the Illinois courts of last resort (*Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV).

The judge in his opinion both discussed and decided the merits of this alleged claim:

> "It is suggested by the Bankruptcy Trustee that an

equitable lien claim might be filed on behalf of Thomas Hart Fisher, but I fail to see how such a claim could possibly affect a settlement of this proceeding. Obviously, the alleged claim of Fisher arose long subsequent to the date of the original bankruptcy to which this entire proceeding relates. Furthermore, it is clear that Fisher's lien claim has been asserted exclusive of the jurisdiction of this Court; and there appears to be no occasion for litigating or re-litigating this same matter in this cause, or preventing settlement of this proceeding on the basis of such alleged claim to an equitable lien. In this connection, this Court's attention has been called to the case of *Joslyn* v. *Joslyn,* 337 Ill. App. 443, where the basis for Fisher's alleged lien claim was shown to consist of two assignments of alimony from his client, Charlotte C. Joslyn, the former wife of the bankrupt, said assignments being dated August 12, 1940 and April 8, 1941, respectively.

"Fisher's claim for attorney's fees, which the Bankruptcy Trustee states may be filed in this cause, was adjudicated adversely to Fisher in the Illinois Appellate Court case, and there has been no reversal of that ruling. It was there held, at page 477:

> 'This case presents flagrant abuses by Fisher of court processes, primarily in his own interest. He has been fully reimbursed for expenses and suit money. In the light of his conduct, he should not be awarded any fees.' " (Tr. 370.)

We have pointed out (Joslyn's brief No. 445, pp. 4-5) that the trustee Young asserted this so-called equitable lien before the referee. The referee found that the attorneys for the Elks had planned to assert a lien upon any funds which would be paid to Young (Tr. 154).

The Honorable Elwyn R. Shaw in an opinion filed February 9, 1945, in this case found that the reopening was for the purpose of blackmail:

> "The next move in this court came eight years after the alleged bankrupt had been discharged, and was obviously engineered by Thomas Hart Fisher as a

> sort of a legal blackmail in an effort to extort enormous fees from George R. Joslyn in connection with the old divorce case." (Rec. 4-7.)

While the Court of Appeals reversed Judge Shaw's order dismissing the entire reopening proceeding *In re Joslyn's Estate,* 171 F. 2d 159, the above-quoted finding has neither been rescinded nor set aside.

Note: Judge Shaw's opinion was in the record before the Court of Appeals but has not been printed. The above quotation, however, is also in *Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443 at 464, 86 N. E. 2d 367 at 377, appeal denied 341 Ill. App. XIV. Judge Igoe quoted from this opinion (Tr. 370). The Court of Appeals also referred to said opinion for a statement of the facts:

> "They (the facts herein) are also succinctly stated in the opinion of the Illinois Appellate Court in a matter which that court considered to be inseparably connected with the bankruptcy proceeding. See *Joslyn* v. *Joslyn,* 337 Ill. App. 443, 449, 457, appeal denied, 341 Ill. App. xiv." (Tr. 423-424.)

The Illinois Appellate Court on the same page with the above statement of Judge Shaw quoted the Honorable John P. Barnes upon one of the hearings in this case. Judge Barnes told Thomas H. Fisher that Fisher's purpose was to blackmail:

> "I haven't any doubt that for four or five long years it has been your purpose to blackmail and extort from them (the Joslyn family) money by means of this bankruptcy. I haven't the slightest doubt of it" and in another instance, "It now seems to me that you have been using the processes of this court in order to blackmail and extort. That is the way it looks to me." (*Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443 at 464, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV.)

The Purported Claim of New Jersey Equities.

On September 13, 1951 (Tr. 294), John S. Miller, Thomas H. Fisher, and Norman Crawford presented the Elks' petition to the Superior Court to vacate the decree of July 12, 1951 (Tr. 295-309). The court denied leave to file on September 20, 1951 (Tr. 294). New Jersey Equities' purported claim with a power of attorney to Norman Crawford and Thomas H. Fisher was executed ten days later—October 1, 1951 (Tr. 335-336). The final hearing in this case was held October 15, 1951 (Tr. 1, 3). This purported claim was withheld from record until October 15, 1951 (Tr. 334-335)—the day of the final hearing (Tr. 1, 3). Norman Crawford on October 11, 1951, served notice that he would present the fourth affidavit of bias and prejudice on October 15, 1951 (Tr. 337).

Note: The first affidavit of bias and prejudice was filed March 12, 1947, against the Honorable John P. Barnes by Thomas H. Fisher as attorney for the Elks (Tr. 15-25). The court granted the motion (Tr. 27). The second affidavit of bias and prejudice was filed February 11, 1949, by Horace Young against the Honorable Elwyn R. Shaw (Tr. 40). Judge Shaw refused to recuse himself. The third affidavit of bias and prejudice was filed May 3, 1950 by Horace Young (Tr. 48-54). Judge Shaw granted the motion (Tr. 65). The fifth affidavit of bias and prejudice was filed November 13, 1951, five days after the final decrees were entered on November 8, 1951 by Thomas H. Fisher, Norman Crawford, and John S. Miller, asking the court to vacate his ruling upon the fourth affidavit of bias and prejudice (Tr. 387). On the day of the filing of the fifth affidavit of bias and prejudice Young and Crawford without notice appeared before Judge Igoe. They asked Judge Igoe for a stay (Tr. 398-399). Although both counsel appeared before Judge Igoe on the day of filing the fifth affidavit attaching him, neither mentioned this affidavit (Tr. 398-399). The dates on the two affidavits attached to this fifth affidavit of bias

and prejudice are, respectively, November 9, 1951 (Tr. 397), one day after Judge Igoe had entered the final decrees and the other October 18, 1951 (Tr. 395). This affidavit was filed without leave.

The transcript shows the exhibits offered October 15, 1951 (Tr. 347-364).

This purported claim of New Jersey Equities was never mentioned upon any hearing before the court. No notice of its filing was ever given.

The findings named the bank creditors whose claims had been filed. New Jersey Equities' claim is not among them (Tr. 382).

New Jersey Equities alleges:

> "2. That George R. Joslyn, * * * was at and before the filing by him of the petition * * * and still is justly and truly indebted to said corporation through its predecessor in interest, New Jersey Fidelity & Plate Glass Ins. Co., in the sum of $2,828.89.
>
> "3. That the consideration of said debt is as follows: Said bankrupt owed a stockholder's liability of $57,100 on 1,142 shares of the capital stock of Chicago Bank of Commerce, * * * and claimant's predecessor in interest, New Jersey Fidelity and Plate Glass Insurance Company, was a depositor in said bank in said sum.
>
> "4. That no part of said debt has been paid, and no claim on account thereof was filed with the State Court Receiver of said bank and no dividend on account thereof paid by him.
>
> * * * * *
>
> "7. That the instrument upon which said debt is founded is attached hereto.
>
> "8. That the said debt was due on June 25, 1932, when said bank closed; * * * and that no judgment has been rendered thereon, except for proceedings in stockholders' liability case." (Tr. 335.)

The alleged instrument on which the debt is stated to be founded in the above paragraph 7 was not attached (Tr. 335-336).

No affidavit by the assignor was attached as required by General Order 21:

Tit. 11, U. S. C. A. 53:

"General Orders, 21.—Proofs of Claim.

* * * * *

"(3) If a claim has been assigned after the commencement of the proceedings but before proof of claim has been filed, the proof of claim therefor shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims."

The purported proof of claim shows no attempt to set out how and when the alleged assignee obtained title as required by Illinois statute:

"Ill. Civil Practice Act, Ill. R. S., Chap. 110, Sec. 146:

"146. Sec. 22. (Who may be plaintiff.) The assignee and owner of a nonnegotiable chose in action may sue thereon in his own name, and he shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title."

"*N. & G. Taylor Co.* v. *Anderson* (1928), 275 U. S. 431, 48 S. Ct. 144, 72 L. Ed. 354.

N. & G. Taylor Co. v. *Anderson* (1926, 7 Cir.), 14 F. 2d 353."

The alleged indebtedness against the bank admittedly did not accrue during the 4½ months—February 10 to June 25, 1932—George R. Joslyn was a stockholder. Under no

theory could New Jersey Equities Co. have any claim. Under Illinois law only creditors whose claims against the bank accrued while Joslyn was a stockholder have any interest in the fund arising from Joslyn's stock liability. (See findings and analysis by referee, Tr. 170-174.)

The two statements, one in paragraph 4, that no part of said debt had been paid and the other in paragraph 8 that judgment had been rendered thereon in the stockholders' liability case indicate the supposed claim of the predecessor in interest against the bank was invalid. The Illinois receiver appointed by the Auditor of Public Accounts had a statutory duty to prove all unproved claims appearing upon the bank's books:

> "The receiver of such bank shall, after the expiration of said twelve weeks, file with the Auditor and with the clerk of such court as may have charge of the liquidation, *a correct list of all creditors of said bank,* as shown by its books, who have not presented their claims and the amounts of their respective claims after allowing all just credits, deductions and set-offs as shown by the books of said bank. *Such claims so filed shall be deemed proven,* unless objections are filed thereto by some party or parties interested therein within such time as shall be fixed by the auditor or by such court as may have charge of the liquidation." (Emphasis ours.)
>
> Chap. 16½, Sec. 11, 1949 Ill. Rev. Stat. Laws 1929, P. 174, #1.

No attempt is made by this purported claimant to explain how or why the receiver failed to do his statutory duty to prove this purported claim if such claim ever existed.

PROPOSITION OF LAW.

If One Assume Contrary to the Pleadings and Proofs in This Case, That the Elks and the New Jersey Equities Owned an Indebtedness Which Accrued Against the Bank During the Four and a Half Months George R. Joslyn Was a Stockholder, February 10 to June 25, 1932, Still Under the Illinois Law, Such Creditors Would Not Have Any Standing to Prove a Claim in the Bankruptcy.

Zimmerman v. *Zeimer* (1936), 363 Ill. 220; 1 N. E. (2d) 854.

Leonard v. *Bye* (1935), 361 Ill. 185; 197 N. E. 546.

ARGUMENT.

If One Assume Contrary to the Pleadings and Proofs in This Case, That the Elks and the New Jersey Equities Owned an Indebtedness Which Accrued Against the Bank During the Four and a Half Months George R. Joslyn Was a Stockholder, February 10 to June 25, 1932, Still Under the Illinois Law, Such Creditors Would Not Have Any Standing to Prove a Claim in the Bankruptcy.

Hillmer, et al. v. *Chicago Bank of Commerce,* Superior Court No. 560305, on behalf of all creditors, was instituted on June 25, 1932. The court restrained all of the creditors from instituting any other suits. It appointed a receiver to receive payments from stockholders. George R. Joslyn was made a party defendant and served with process long before the bankruptcy (Tr. 272-273). Under Illinois law, a creditor whose indebtedness against the bank accrued during the four and a half months George R. Joslyn owned the stock had no standing in any court to institute a suit against George R. Joslyn.

This question was passed upon squarely by the Supreme Court of Illinois in *Zimmerman* v. *Zeimer* (1936), 363 Ill. 220; 1 N. E. (2d) 854. Zimmerman whose indebtedness against the savings bank accrued while Zeimer was a stockholder instituted the suit. The court held that the Superior Court could not entertain the proceeding. The court said:

> "To give the constitutional provision any other interpretation would afford individual creditors an undue and unfair advantage over those creditors who present their claims in the representative proceeding in equity. It would furnish opportunity for a stockholder to prefer one creditor over creditors generally, it would positively prevent the creation of a fund to be

distributed ratably among all creditors, as the constitution contemplates, and would result in serious confusion in the liquidation of insolvent banks. Such a condition was not intended by the framers of the constitution."

Zimmerman v. *Zeimer*, 363 Ill. 220 at 221-222, 1 N. E. (2d) 854.

In *Leonard* v. *Bye* (1935), 361 Ill. 185; 197 N. E. 546, the stockholder moved to dismiss the depositor's action on the ground that a class suit had been previously filed. Leonard, the creditor contended in the Supreme Court that he was not bound by the gratuitous acts of complainants in the representative suit. Holding that Leonard had no standing to institute any suit, the court said:

"There can be no doubt that circuit courts have jurisdiction over representative suits. In such suits the remedy is furnished to a class of individuals who have common rights, who need protection, and in pursuit of that remedy individuals have the right to represent the class to which they belong. The complainants in the suit purported to represent the appellant, who would be bound by the results in the case until the decree rendered there is reversed on appeal."

Leonard v. *Bye*, 361 Ill. 185 at 190; 197 N. E. 546.

Conclusion.

Petitioners have shown no ground for issuance of the writ of certiorari. The constitutional provision imposing liability upon bank stockholders has been repealed. All the claims have been paid. Any questions which at one time existed have become moot. We respectfully submit that the Petitions for Certiorari should be denied.

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Dominick Varraveto, Jr.,
Counsel for Respondent,
George R. Joslyn.

21

JAN 15 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

Petitioners,

vs.

GEORGE R. JOSLYN, ET AL.,

Respondents.

ON PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ON PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

The petitioners, New Jersey Equities Company and Horace A. Young, as Trustee in bankruptcy, have adopted the brief and argument in support of the petition of the Benevolent and Protective Order of Elks of the United States of America for writ of certiorari, pending as Docket No. 445. On December 15, 1952, respondents Wade Fetzer, Jr., *et al.*, filed a brief in opposition to the Elks' petition. No

new question is presented by the joint petition of the New Jersey Equities Company and Horace A. Young, as Trustee in Bankruptcy, or by their supporting brief. It seems appropriate, therefore, that the brief in opposition of respondents Wade Fetzer, Jr., *et al.*, should take the form of a memorandum with respect to the variant statement of facts and argument in the joint petition.

1. Petitioners assert that the creditors of the bankrupt fall into two categories—those who "participated" in the funds distributed in the state court proceedings and those who did not or will not participate, and that the New Jersey Equities Company "speaks" for the latter group. No such finding was made by either of the courts below nor by the referee. The court of appeals below noted that the petitioners made such *assertion* (Tr. 425), but nothing in the opinion indicates that the court agreed with this contention. The only support in the record for the statement that there are two groups of creditors of the Chicago Bank of Commerce and that one group did not or will not participate in the distribution effected in the state court is the Trustee's petition for injunctive relief (Tr. 268-279). This petition (Tr. 275-6) has no probative value. The answer of the respondents Wade Fetzer, Jr., *et al.*, to this petition specifically denied all such allegations (paragraphs 11 (e), (f), (g)), in the Trustee's petition (Tr. 312). No offer of proof was made by the Trustee in support of the allegation that there were two separate groups of creditors of the bank and that one group did not participate in the liquidating dividend. The controverted allegations of the Trustee's petition cannot be taken as proof (*Bakersfield Abstract Co.* v. *Buckley* (C. C. A. 9), 100 F. (2d) 530, 532).

2. The New Jersey Equities Company does not have an appealable interest. Its claim was filed without leave of court and without notice to anyone. The claim was not proved nor allowed for any purpose. It was filed on the

day that the District Court heard all of the pending matters and took the cause under advisement. None of the respondents ever learned of its existence until it was designated by petitioner as part of the record on appeal. The New Jersey Equities Company does not, therefore, have such an interest as entitles it to request a review of the action of the lower courts (*In re Milwaukee and Sawyer Building Corporation* (C. C. A. 7), 79 F. (2d) 478, 479; *In re Granada Apartments* (C. C. A. 7), 104 F. (2d) 970, 973, cert. denied 308 U. S. 607).

3. The New Jersey Equities Company was neither a creditor of the bankrupt nor a creditor of the Chicago Bank of Commerce. It claims as assignee of the New Jersey Fidelity and Plate Glass Insurance Company (Tr. 335-336). The claim does not show when the New Jersey Fidelity and Plate Glass Insurance Company assigned its claim against the Chicago Bank of Commerce to the New Jersey Equities Company. If the claim was assigned after the bankruptcy of Joslyn, the claim was required to be supported by an affidavit of an officer of the New Jersey Fidelity and Plate Glass Insurance Company, setting forth the true consideration for the assignment and whether or not it was secured (General Order XXI (3)). The claim of the New Jersey Equities Company is, therefore, a nullity.

4. Under the Illinois law a stockholder of an Illinois bank is liable only to the extent of the par value of his shares for the unsatisfied debts of the bank accruing during his period of stock ownership, and he is discharged by payment to the receiver in the representative suit of an amount equal to those debts by stockholders during that period (*Holderman* v. *Moore State Bank*, 383 Ill. 534, 542, 50 N. E. (2d) 741). The creditors in the stockholder liability case may for practical reasons consent to make distribution through the receiver appointed at the request of the Auditor of Public Accounts to liquidate the bank. It then becomes

such receiver's duty to distribute such funds ratably among the creditors of the bank (*Holderman* v. *Moore State Bank*, 383 Ill. 534, 543, 50 N. E. (2d) 741). The consent of Hillmer, *et al.*, on behalf of all of the creditors of the Chicago Bank of Commerce to distribute funds collected in the stockholder liability case in such manner is binding upon all such creditors, including the New Jersey Equities Company (*Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363-4; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, cert. denied, 266 Ill. App. XV; *Groves* v. *Farmers State Bank*, 368 Ill. 35, 48, 12 N. E. (2d) 618); The New Jersey Equities Company, as well as the Elks and all other creditors of the Chicago Bank of Commerce, participated in the state court proceedings through their class representatives, Hillmer, *et al.*

5. It is true that the trustee in bankruptcy, Horace A. Young, did not participate in the state court proceeding. It is *not* true that he never had any actual knowledge of the state court proceedings. On March 31, 1949, respondents Wade Fetzer, Jr., *et al.*, sought to intervene in the bankruptcy proceeding and by their notice and petition apprised the Trustee in bankruptcy of the stockholder liability suit and respondents' claim for reimbursement (Tr. 41-46). *Actually, the Trustee was apprised of the stockholder liability case when he was appointed Trustee,* for at that time Hillmer, *et al.*, had filed a claim on behalf of all of the creditors of the Chicago Bank of Commerce in the bankruptcy proceeding. The district court on June 1, 1948, dismissed the reopened bankruptcy proceeding because the court was of the opinion that the remedy of the Elks was in the stockholders' liability case. It was from this order that Horace A. Young, as Trustee, prosecuted the appeal which was decided in *In re Joslyn*, 171 F. (2d) 159, 160, 166. It is true, as petitioners assert, that no order was entered in the bankruptcy proceeding authorizing or di-

recting the Trustee in bankruptcy to participate in the state court proceeding. The reason no such order was entered is that the Trustee in bankruptcy never made application for any such order. If the Trustee did not wish to intervene in the state court proceeding which had jurisdiction of the subject matter of the stockholder's liability of George R. Joslyn, and of George R. Joslyn personally (subject to Joslyn's personal defense of a discharge in bankruptcy), the Trustee in bankruptcy cannot complain that orders were entered in the state court proceeding without notice to him. *Notice of the presentation of the settlement petition praying for the entry of the Superior Court order of July 18, 1951, was given to all persons entitled thereto as appears from the findings of the Superior Court order* (Tr. 348). Petitioners' statement that the state court judge clearly stated that he would not have entered the decree of July 18, 1951, if he had not been under the erroneous impression that all the attorneys interested in the matter were before him is plainly untrue. The stockholders' liability case was a class action. Notice to the plaintiffs in the stockholders' liability case was notice to all creditors of the Chicago Bank of Commerce (*Kape* v. *Home Bank and Trust Co.*, 370 Ill. 170, 172, 18 N. E. (2d) 170).

6. Petitioners argue that at the time of the entry of the order of July 18, 1951, the bankrupt had not withdrawn his defense of discharge in bankruptcy. As pointed out in our reply to the Elks' petition for certiorari, the intent of the bankrupt to waive his discharge in bankruptcy or to renew his debt by a new promise was inferable by his silence when his attorney presented his father's petition offering to pay the liability of the bankrupt if it were promptly adjudicated (*Dimock* v. *Revere Copper Company*, 117 U. S. 559, 566; *In re Innis* (C. C. A. 7), 140 F. (2d) 479, 481, cert. denied, 322 U. S. 736).

7. It is argued by petitioners that the order of July 18,

1951, was not a judicial decree but merely an agreement of the consenting parties judicially recorded. The mere fact that the order was okayed by the counsel for all of the parties did not alter the fact that it was an adjudication (*St. Louis B. & S. Ry. Co.* v. *Gray*, 100 Ill. App. 538, 539). The Superior Court trial judge actually made an independent examination of the authorities to determine whether interest was collectible and concluded that interest was not collectible (Tr. 390).

8. The reason relied upon by petitioners for the allowance of a writ of certiorari is that the decision of the court below was a relinquishment of its exclusive control of the administration of the bankrupt estate. This argument assumes that the state court did not have jurisdiction to adjudicate the liability of Joslyn as a stockholder of the Chicago Bank of Commerce. As we pointed out in our brief in opposition to the Elks' petition for the allowance of a writ, the Superior Court had jurisdiction to adjudicate the liability of the stockholders of the Chicago Bank of Commerce to the creditors of that bank in a class action brought by Hillmer, *et al.*, and the state court also had jurisdiction of the person of George R. Joslyn by reason of his appearance and answer in that case (Tr. 186, 354-356). The jurisdiction of the state court was not divested by the subsequent bankruptcy proceeding (*Dimock* v. *Revere Copper Company*, 117 U. S. 559, 564-6). The bankrupt's defense of his discharge in bankruptcy was a personal one which he could waive. And he did waive his defense by his silence when his own attorney presented the father's petition offering to settle the bankrupt's stockholders' liability if it were promptly adjudicated (*In re Innis* (C. C. A. 7), 140 F. (2d) 479, 481, cert. denied, 322 U. S. 736). The subsequent adjudication by the state court merged the stockholder's liability of the bankrupt in the Superior Court decree of July 18, 1951. When the decree was satisfied in open

court the decretal liability was extinguished. When the liability was extinguished it no longer afforded a basis for a claim against the bankrupt estate.

9. The extinguishment of the claim of the creditors of the Chicago Bank of Commerce to enforce the stockholder's liability of Joslyn left the bankruptcy estate without any creditors (Tr. 380). The decree of the district court provided for a fund of $50,000.00 to take care of the fees of the Trustee and the attorneys. Neither the Trustee nor the other petitioners claim that $50,000.00 is insufficient for such purpose. What good purpose could be fulfilled by continuing the three plenary actions to collect administrable assets totaling $500,000.00 is difficult to perceive. The court will not be oblivious to the realities. The contention of petitioners that the release of such assets permanently harms the bankruptcy administration is difficult to take seriously, particularly in view of the factual background set forth in *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 457, 464, 86 N. E. 2nd, 367, 374, to which attention was called by the court below (Tr. 424). The exercise of the court's discretionary power to terminate a bankruptcy proceeding when the bankruptcy estate "is without creditors or claimants" (Tr. 368, 383) does not limit or restrict the paramount and exclusive jurisdiction of the bankruptcy court over bankruptcy matters. To do what is obviously to the best interest of the bankrupt's estate under such circumstances is an exercise of such jurisdiction.

10. Petitioners devote much attention to *Brown* v. *O'Keefe*, 300 U. S. 598. That case was not the basis for the decision of the court below. The case was merely referred to by the court below in a discussion of its previous rulings. The court observed in effect that the claim of a receiver of a national bank is similar to the claim of a representative of all the creditors of an Illinois state bank and that the receiver appointed by the Comptroller in the

Brown case and the receiver appointed by the Superior Court in the present case are comparable in the sense that they are the only persons to whom payment can be made to discharge the liability of the stockholders.

11. The opinion of the court below upheld the district court on the theory that the district court was vested with and exercised the discretion of a chancellor in approving the final settlement of the bankrupt's stockholders' liability in the state court and in terminating the bankruptcy proceeding on the basis of that settlement (Tr. 424). The district court had the power and discretion to order the parties to proceed in the Superior Court stockholders' liability case to establish by a decree in that case the bankrupt's liability on his stock of the Chicago Bank of Commerce as recommended by the Referee (Tr. 176-7) (*Nathan* v. *Labor Board,* 344 U. S. 25, 30). If the district court could permit such remission initially it could subsequently accommodate itself to the adjudication by ratification. Contrary to the repeated contentions of petitioners, the bankrupt's liability as a stockholder was not liquidated prior to the Superior Court decree of July 18, 1951. Under the Illinois law the bankrupt was liable only for the debts of the Chicago Bank of Commerce which accrued while he was a stockholder *and only to the creditors whose claims accrued in that period.* In *Holderman* v. *Moore State Bank,* 383 Ill. 534, 540, 50 N. E. (2d) 741, 745, the Illinois Supreme Court said:

> The correct rule of liability is set out in *Golden* v. *Cervenka, Sanders* v. *Merchants' State Bank* and *Burket* v. *Reliance Bank & Trust Co.* With this measure of liability thoroughly established it would be inaccurate to say a stockholder is liable to any other creditor of the bank than one whose debt accrued while he is a stockholder, and to say that such stockholder is liable to all of the creditors of the bank would render him responsible to creditors who existed both before and after the time he was a stockholder, which is

directly contrary to the established rule of a stockholder's liability.

The Referee found that no proof had been made in the bankruptcy proceeding that either the Elks or any other claimant had claims against the Chicago Bank of Commerce which accrued while the bankrupt was a stockholder and that to hear the evidence on the question of which of the bank's creditors are also creditors of the bankrupt and how much of the bank's debts accrued during the period Joslyn was a stockholder and remained unpaid when the bank closed would mean hearing and determining virtually all the issues which had already been tried in the representative creditors suit in the state court (Tr. 175). If Joslyn's father had not presented his settlement petition in the Superior Court and the district court had acted upon the Referee's recommendation and remitted the issues on the stockholders' liability to the Superior Court for adjudication in the stockholders' liability case the Superior Court would have entered a decree against the bankrupt in precisely the same amount and directing payment to the receiver in the stockholders' liability case. The $57,100.00 recovered by the receiver under such a decree would *eo instante* have been impressed with the trust created by the prior Superior Court decree of February 14, 1950 (Tr. 187-211) which provided that the receiver should hold any and all money thereafter received by him in trust for the use and benefit of Wade Fetzer, Jr. and the other stockholders who had overpaid their liabilities as stockholders until their overpayments were repaid in full (Tr. 205). The court of appeals below obviously concluded that the district court had a discretionary power to remit the issues pertaining to the stockholder's liability of the bankrupt to the Superior Court and that, therefore, there could be no abuse of its discretionary powers in chancery to approve the method of such adjudication which it had the right to initiate and which, as the referee had pointed out (Tr.

175-7), had the compelling utility of providing for a just and equitable result.

12. The theory adopted by the court of appeals below in sustaining the decree of the district court is different from the one advanced by respondents Wade Fetzer, Jr., *et al.*, previously outlined and set forth more at length in our reply to the petition of the Elks. Both theories are applicable. Both produce the same result. The state court had jurisdiction to enter the decree of July 18, 1951, and the district court did not relinquish its exclusive jurisdiction over bankruptcy matters in entering its decree of November 8, 1951.

13. This memorandum has been confined to consideration of whether the court below reached the correct result. While the answer to that question is not normally dispositive of the question now before this Court, the inquiry in this case is of more than usual relevancy. So far as we have been able to determine the only ground on which the petitioners are seeking a review is that the decision of the court of appeals below is erroneous. No conflict of decision has been presented. Nor does it appear that the case is of a peculiar gravity or of general importance. Petitioners state that the decision below is in conflict with the clear language of the Bankruptcy Act and the numerous decisions of this Court. But so far as we can ascertain they have no other than a woman's reason: They think it is so because they think it is so.

For the foregoing reasons the petition of the New Jersey Equities Company and Horace A. Young, as Trustee in Bankruptcy, for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. METZDORF,
Pro se and as counsel for
Wade Fetzer, Jr., et al.

January, 1953.

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JAN 15 1953

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Respondents.

BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinions of the lower courts are reported in 198 F. (2d) 673 and 102 F. Supp. 521. They also appear in the Transcript of Record at pages 422-26, 511-12 and 365-71.

Correction of Summary Statement of Additional Matters.

Although the petition of the New Jersey Equities Company and the Trustee in Bankruptcy adopts "in all respects" the petition of the Benevolent and Protective Order of Elks of the United States of America, docketed as #445,

and purports to state only "certain additional facts and certain additional argument" (p. 2), said petition covers much the same ground as the prior petition of the Elks.

The principal new matters referred to in the Summary Statement of Additional Matters relate to (1) a description of the New Jersey Equities Company as a *creditor* of the bankrupt, and (2) the classification of the creditors of the Chicago Bank of Commerce into "participating" and "non-participating" groups. The record, however, does not support petitioners' claim with respect to either of these additional matters.

(1) The New Jersey Equities Company is described as "a substantial creditor" of the bankruptcy estate (Pet'n. 2). The claim of said petitioner shows on its face that it is derivative through an assignor, who was a depositor in the Chicago Bank of Commerce in which the bankrupt owned 1,142 shares of stock of a par value of $50 per share (R. 335). The method by which the liability of said stockholder was adjudicated and satisfied in the stockholders' liability suit in the state court is fully described on pages 2 and 3 of respondent's answer to the prior Petition for Certiorari, docketed as #445 to the October 1952 term of this Court, to which reference is hereby made. It is to be noted that said action of the Superior Court of Cook County did not affect the proceedings in bankruptcy herein except to prevent creditors of the Chicago Bank of Commerce from claiming that the stockholders' liability of George R. Joslyn had not been satisfied and released (R. 348-53, 357-58). Suffice it to say at this time that the stockholder's liability of George R. Joslyn to the New Jersey Equities Company has been fully satisfied and released and that said petitioner is not now a creditor of said George R. Joslyn.

(2) Similarly, the classification of creditors into "participating" and "non-participating" groups (Pet'n. 2-6)

is not supported by any order or decision of the lower courts herein and is inconsistent with the basic theory of representative or class suits—in which all members of the class share in recoveries thereby effected (R. 173). The findings and conclusions of the Referee in Bankruptcy, the trial judge and the Court of Appeals in this case uniformly recognize the *representative* character of the stockholders' liability suit in the state court and the right of all creditors to share ratably in the collection of the stockholders' liability (R. 173, 380, 382, 423, 425). Nothing in this record supports the separation of said creditors into different groups, as suggested by petitioners, and the argument based upon petitioners' artificial classification should be ignored.

Other misstatements and unwarranted distortions of fact are contained in petitioners' Summary Statement of Additional Matters. For example, it is baldly stated, on page 3, that prior to July 18, 1951, petitioners had no "actual knowledge" of the proceedings in the state court. This is patently and demonstrably untrue. After the reopening of the bankruptcy in 1946, the existence and status of the stockholders' liability suit in the Superior Court of Cook County is spread throughout the record in the bankruptcy court (R. 3-4, 14, 36, 41-46, 67-69, 77, 82, 87, 92-100, 107-17, 120-26, 128, 130, 133-37, 144-46, 158-59, 169, 176, 183-86, 187, *et seq.*, 230, 234-36).

Prior to July 18, 1951, the petitioner Horace A. Young, as Trustee in Bankruptcy, referred to and based arguments upon said state court proceedings in pleadings filed in the bankruptcy court (R. 77, 82, 87, 107-17, 130, 230, 234-36). In 1948—at a time when said trustee claims to have been without knowledge of the state court proceedings—said trustee was the appellant in a prior appeal in this case in which the state court proceedings were fully considered (*Young* v. *Joslyn, et al.*, 171 F. (2d) 159, 166-67). Equally aware of the stockholders' liability suit in the state court

was Thomas Hart Fisher, Esq. (R. 75, 92-106), one of the attorneys for the New Jersey Equities Company (R. 336, 413-14), who was also the attorney for the Elks (R. 13, 90-91, 106). This record completely disputes the claimed ignorance of petitioners relating to the stockholders' liability action in the state court prior to July 18, 1951.

It is not correct to say, as do petitioners on page 4, that "George R. Joslyn, having obtained his discharge in bankruptcy on June 29, 1936, asserted said discharge at all times thereafter as a valid defense to his stockholder's liability in the State Court proceeding." Joslyn's discharge in bankruptcy was removed as a bar in the state court action by the reopening of the bankruptcy on May 20, 1946 (R. 2), and was not thereafter relied upon by him as a defense (R. 67-69, 348-53).

Nor did counsels' approval of the order determining and satisfying Joslyn's liability as a stockholder destroy the judicial character of that adjudication. This record clearly shows that Judge Hoffman "took a lot of time" in deciding the matter (R. 389), that he conferred with other judges about it (R. 390-91), that he didn't take the "word of any of the lawyers as to what the law was" but "checked it" himself because he "wanted to be sure" (R. 390), and that he required the signatures of the attorneys only for his "own protection" (R. 393). Under these circumstances, the order determining and satisfying Joslyn's liability was a judicial determination of the matter and represents far more than an agreement by the parties to the litigation. It was *not* a "consent decree" in any accepted sense of the term.

On page 5 petitioners repeat the argument in the prior petition that interest was due on the claims of creditors of the bankrupt. This is the fundamental premise upon which both petitions are based and is adequately answered

in the final portion of this respondent's answer to the prior petition (Docket #445) where the relevant authorities are cited and discussed. The law is well settled that interest is not a part of bank stockholders' liability in Illinois and that the *maximum* amount for which a stockholder in an Illinois bank is liable is the par value of the stock owned by him. This was precisely the amount paid to the receiver in the stockholders' liability suit involved herein. Said payment of $57,100 constituted a complete satisfaction and discharge of the stockholder's liability of George R. Joslyn, and thereupon, as described by the trial judge, this bankruptcy became "a bankruptcy case without creditors or claimants" (R. 368, 380, 383). Academic discussions of whether bankruptcy creditors are entitled to interest are utterly meaningless in a situation—like the present—which involves a solvent bankrupt without creditors.

Since the stockholder's liability of the bankrupt has been satisfied and discharged, the argument in the final portion of the petition (pp. 6-9) to the effect that the decree herein "permanently harms the bankruptcy administration and the bankruptcy creditors" is obviously unsound. The only purpose for continuing the bankruptcy herein would be to permit the trustee to take physical possession of the estate of George R. Joslyn and—after paying fees, costs, and expenses of administration—to return the property to the solvent bankrupt. This same result is accomplished by the decree of the trial court herein, which expressly "reserves jurisdiction of George R. Joslyn for the purpose of adjudicating and enforcing against George R. Joslyn any and all claims for fees, costs and expenses that he may be ordered to pay by this Court in this proceeding" (R. 386). The choice between these two methods of paying fees, costs and expenses of administration of a solvent estate is not of such vital importance or of so great public interest as to warrant the granting of certiorari herein.

Question Presented.

The basic question underlying this case is whether the Superior Court of Cook County, Illinois, in the stockholders' liability suit therein pending had *jurisdiction* to adjudicate and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. If said state court had jurisdiction, then the liability of the bankrupt has been satisfied by payment, and the New Jersey Equities Company—as well as every other depositor of said bank—has ceased to be a creditor of the bankrupt.

No Grounds Exist for Allowance of Certiorari.

Petitioners seek allowance of certiorari on the grounds that the decision of the Court of Appeals violates fundamental principles of bankruptcy law and is in conflict with the Constitution and laws of the United States and the decisions of other Courts of Appeals. As hereafter demonstrated, none of these contentions are sound.

ARGUMENT.

Since petitioners have adopted the brief and argument attached to the petition of the Elks, heretofore docketed as #445 to the October 1952 term (Pet'n 2, 12), the court should carefully consider this respondent's answer to said petition in determining whether certiorari should be granted herein. We shall not repeat the arguments contained therein except to the extent necessary to answer arguments contained in the present petition of the New Jersey Equities Company and the Trustee in Bankruptcy.

At the outset attention should be focused on the question of whether the action of the trial court in providing for payment of fees and expenses and in terminating "a bankruptcy without creditors or claimants" (R. 368, 386-87) is so unreasonable and of such public importance as to warrant review by certiorari. In this connection, it is well to remember that this court has repeatedly held that the issuance of writs of certiorari "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258, and cases therein cited.

Respondent believes that even if this court should be of the opinion that the method suggested by petitioners for paying fees and expenses of the bankruptcy is preferable to the method adopted by the trial court, the slight difference between these two methods is not sufficiently great or of such public interest as to justify the issuance of the writ herein.

I.

THE STATE COURT HAD JURISDICTION TO ADJUDICATE AND SATISFY THE STOCKHOLDER'S LIABILITY OF GEORGE R. JOSLYN.

Despite protestations to the contrary, the principal question involved herein is whether the Superior Court of Cook County had jurisdiction to adjudicate and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. If it did, no depositor in said bank could thereafter enforce any claim against said stockholder based upon a depositor-creditor relationship. Since this is precisely the position in which the New Jersey Equities Company and the Elks find themselves, it is obvious that the extent of the jurisdiction of the state court becomes extremely important herein.

A. A class suit in the Superior Court of Cook County was the proper method of enforcing the stockholder's liability of George R. Joslyn.

The Constitution and statutes of Illinois create the liability which is the basis of the claim of the Elks and the New Jersey Equities Company as petitioners herein. See the Illinois CONSTITUTION, Art. XI, § 6 and the BANKING ACT of Illinois, § 6 (Ill. Rev. Stat. (1951) Chap. 16½, § 6).

It has long been established by statutes and court decisions in Illinois that the proper method of enforcing the liability of stockholders in Illinois banks is by a class suit for the benefit of all creditors of the bank. BANKING ACT OF ILLINOIS (Ill. Rev. Stat. (1951) Chap. 16½, § 11); *Heine* v. *Degen*, 362 Ill. 357, 365-6; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 151-3; *Elkin* v. *Diversey Tr.*

& Svgs. Bank, 363 Ill. 160, 164-5; *RFC* v. *Central Republic Trust Co.,* 11 F. Supp. 976, 983-4 (D. C. Ill.).

The class suit filed by this respondent in the Superior Court of Cook County was an action of the character recognized in Illinois as proper for the enforcement of stockholders' liability. *Hillmer* v. *Chicago Bank of Commerce,* 375 Ill. 266.

B. Prior to the bankruptcy herein the Superior Court of Cook County acquired and retained jurisdiction over the person of George R. Joslyn and the subject matter of his stockholder's liability.

In 1932—more than four years prior to the bankruptcy proceedings herein—the Superior Court of Cook County acquired jurisdiction over the person of the bankrupt and the subject matter of his stockholder's liability (R. 373, 375-76, 348-49). At the same time, the court appointed a receiver to receive the amounts due from stockholders and enjoined all creditors of said bank from seeking to enforce this liability elsewhere (R. 183-86). Said injunction is still in force (R. 350, 97-98).

Both the state court and the trial court herein have found as a *fact* that the Superior Court of Cook County obtained and retained jurisdiction to determine the stockholder's liability of George R. Joslyn (R. 348-53, 375-76).

That the subsequent bankruptcy of the defendant Joslyn did not *ipso facto* destroy the power of the state court to proceed to judgment in the action to enforce stockholders' liability is evident from the decisions of this court in *Connell* v. *Walker,* 291 U. S. 1, 5-6, *Dimock* v. *Revere Copper Co.,* 117 U. S. 559, 564, and *Norton* v. *Switzer,* 93 U. S. 355, 362 and numerous cases therein cited.

C. Neither of the petitioners herein took any action to stay the stockholders' liability suit in the state court.

Petitioners *admit* that they never participated in the state court proceedings prior to the satisfaction of Joslyn's stockholder's liability on July 18, 1951 (Pet'n 3). This is a true statement of fact and is fatal to much of petitioners' argument for reversal of the action of the trial court herein.

In a desperate effort to overcome the obvious effect of inaction on their part, petitioners claim that they did not have "any actual knowledge of" the state court suit until "a few days before September 11, 1951" (Pet'n 3-4). As previously pointed out, this claimed ignorance on the part of petitioners is utterly false.

The Trustee in Bankruptcy, who is acting as his own attorney herein, described and referred to the state court suit in at least three separate pleadings filed by him in the bankruptcy court prior to the settlement of the liability of George R. Joslyn on July 18, 1951 (R. 77-89, 107-17, 234-36). He was both *party* and *counsel* in a prior appeal wherein the court fully considered the state court proceedings (*Young* v. *Joslyn*, 171 F. (2d) 159, 166-67).

Similarly, Thomas Hart Fisher, Esq., one of the attorneys for the petitioner New Jersey Equities Company (R. 336, 413), has also been an attorney for the Elks ever since reopening of the bankruptcy in 1946 (R. 13, 90-901). Said attorney was necessarily cognizant of the stockholders' liability suit in the state court when he filed the answer of the Elks to the intervening petition based upon said stockholders' liability suit (R. 104, 106).

The failure of petitioners to take appropriate action to stay proceedings in the state court should now preclude them from complaining about the adjudication by the state court and the satisfaction therein of the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce.

II.

THE ACTION SOUGHT TO BE REVIEWED HEREIN IS A PROPER EXERCISE OF THE DISCRETION OF THE BANKRUPTCY COURT.

Petitioners urge review by certiorari because, they say, the trial court's approval of the action of the state court was a relinquishment of the *paramount* and *exclusive* jurisdiction of the bankruptcy court. This argument is predicated on the fallacy that bankruptcy courts are devoid of all discretion and that all matters affecting bankrupts *personally*—as well as their property—must be tried and determined only in the bankruptcy court. Such is not the law—as will appear from an examination of *Callaway* v. *Benton,* 336 U. S. 132, and other decisions of this court hereafter cited.

A. Bankruptcy courts are inherently courts of equity and, as such, are vested with discretionary powers.

This court in *U. S. National Bank* v. *Chase National Bank,* 331 U. S. 28, said:

> "It has long been established that 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' " (Citing cases.) p. 36.

See also Sec. 2 of the Bankruptcy Act (11 U. S. C. A. § 11).

Respondent submits that a court of equity *without discretionary powers,* as contended for by petitioners, is judicially incomprehensible.

B. The Bankruptcy Act does not limit the discretionary power of the bankruptcy court in the situation presented by this record.

Numerous provisions of the Bankruptcy Act necessarily require the exercise of *discretionary* powers in order to effectuate the purposes of the act. Thus, Section 11(b) and (c) (11 U. S. C. A. § 29) invests the bankruptcy court with discretionary power to determine whether a trustee in bankruptcy should prosecute or defend litigation pending in other courts. Similarly, Section 63(b) (11 U. S. C. A. § 103) expressly vests in the bankruptcy court full discretion to authorize the liquidation of claims against the bankrupt "in such manner as the court shall direct."

It is particularly noteworthy that, although other provisions of the Act also require the exercise of discretionary powers, petitioners herein have failed to cite a single section of the Act which prohibited the trial court from entering the order sought to be reviewed.

C. The concept of "paramount and exclusive jurisdiction" is not inconsistent with the exercise of "discretionary power" by the bankruptcy court.

Petitioners base much of their argument (pp. 12-14) upon the theory that the terms "discretionary power" and "paramount and exclusive jurisdiction" are **mutually exclusive** (Pet'n 12). That such is not the law is clear from the decisions of this court in *Callaway* v. *Benton,* 336 U. S. 132, *Nathanson* v. *N.L.R.B.,* 344 U. S. 25, and *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478.

In *Callaway* v. *Benton* this court said:

> "We have held that a court of bankruptcy has exclusive and nondelegable control over the administration of an estate in its possession. * * * There

> can be no question, however, that *Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.* * * * What it did give is exclusive jurisdiction of the debtor and its property wherever located. * * * We think that the interest here involved is not part of the property of the debtor, and that the district court's assertion of *exclusive* jurisdiction was error." 336 U. S. 132, 142-43. (Italics ours.)

To the same effect is the recent case of *Nathanson* v. *N.L.R.B.*, 344 U. S. 25, 30, decided by this court three months ago, which cited and relied upon *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483-84.

In a supreme effort to make this case appear to be something different from that shown by the record, petitioners contend that the Court of Appeals affirmed a surrender of the paramount and exclusive jurisdiction of the bankruptcy court (Pet'n 13) and permitted the state court "to collect and distribute the assets" (Pet'n 14). The inference, of course, is that the assets referred to were assets of the bankruptcy estate.

The truth of the matter is that the subject matter of the state court proceedings was an action *in personam*—as distinguished from a proceeding *in rem*—and that the only funds collected and distributed by the state court were moneys paid by the father of the bankrupt to satisfy the liability of his son (R. 376-77, 351-52, 246). Said funds were not a part of the bankruptcy estate and were in no way available to the Trustee in Bankruptcy herein.

In these circumstances, the bankruptcy court, in the wise exercise of its discretion, elected not to interfere with the state court proceedings—as it had a right to do in the exercise of its paramount and exclusive jurisdiction—because no assets of the bankrupt's estate were involved in

that suit. This action conformed to the decisions above cited, in which this court recognizes that the exercise of discretionary powers by the bankruptcy court is not inconsistent with the paramount and exclusive jurisdiction of that court.

III.

RELEVANT AUTHORITIES SUSTAIN THE ACTION OF THE LOWER COURTS HEREIN.

On pages 8 and 9 of the answer of this respondent to the petition of the Elks (Docket #445) are collected the cases most analogous to the facts disclosed by this record. All of said cases support the action of the lower courts herein.

A. Dimock v. Revere Copper Co., 117 U. S. 559, is decisive of the issues herein.

In a procedural situation somewhat similar to the one presented by this record, this court held in *Dimock* v. *Revere Copper Co.* that bankruptcy proceedings did not bar a state court, which had acquired prior jurisdiction over the person and subject matter, from entering a valid judgment in the state court.

For obvious reasons, petitioners herein have failed to refer to or distinguish the *Dimock* case which this respondent believes to be decisive herein.

B. Cases cited by petitioners are inapplicable and irrelevant herein.

Petitioners cite only three decisions of this court in support of their argument concerning the mutually exclusive character of "discretionary powers" and "paramount and exclusive jurisdiction" of the bankruptcy court (*U.S.F. &*

G. Co. v. *Bray,* 225 U. S. 205, *New York* v. *Irving Trust Co.,* 288 U. S. 329, *Pepper* v. *Litton,* 308 U. S. 295), and are forced to admit (Pet'n 13-14) that the most recent decision of this court does not support their argument but recognizes the existence of a **discretionary power** in the bankruptcy court (*Nathanson* v. *N.L.R.B.,* 344 U. S. 25, 30, 97 L. ed. 13, 17 (Advance Sheets)).

None of the cases cited by petitioners involved a *solvent* bankrupt having no unpaid creditors, and a cursory examination of these cases discloses their inapplicability and irrelevancy herein.

In *U.S.F. & G. Co.* v. *Bray,* 225 U. S. 205, the state court, in proceedings filed **after** the bankruptcy, sought to affect and deal with funds in the possession of the Trustee in Bankruptcy. In the present case, the state court acquired jurisdiction **long prior** to the bankruptcy and did not in any manner seek to affect the bankruptcy estate or funds held by the trustee. It is apparent that the action of the trial court herein was **not** the *surrender of control over funds in the possession of the Trustee in Bankruptcy,* as was the action of the court in *U.S.F. & G. Co.* v. *Bray.*

New York v. *Irving Trust Co.,* 288 U. S. 329, involved a situation in which the State of New York sought "to participate in the assets of a bankrupt" (p. 330) and the question there involved was whether the state could establish its claim in bankruptcy. The inapplicability of this decision to the facts herein—where the state court judgment has been satisfied by a third party—and the judgment creditor did not seek "to participate in the assets of the bankrupt," is too apparent to merit further discussion.

Pepper v. *Litton,* 308 U. S. 295, involved the disallowance of a claim in bankruptcy and the administration of the bankrupt's assets by the bankruptcy court. No such situation is presented by the record herein.

In the final portion of their brief (pp. 14-18) petitioners discuss at length the case of *Brown* v. *O'Keefe,* 300 U. S. 598, which was cited in the opinion of the Circuit Court of Appeals (R. 426). Contrary to petitioners' contention that the Court of Appeals placed much emphasis on this case, it is apparent from a reading of the decision that the court merely referred to the case in explaining its decision on the prior appeal reported in 171 F. (2d) 159. The decision of the Court of Appeals sought to be reviewed was in no way dependent upon *Brown* v. *O'Keefe,* and the treatment of that case by the Court of Appeals does not warrant the consideration given it by petitioners. The complete answer to petitioners' argument concerning *Brown* v. *O'Keefe* is already in the record at pages 486 to 490, to which the attention of the court is directed if petitioners' argument assumes any importance herein.

The principal relevancy of *Brown* v. *O'Keefe* at this stage of the proceeding lies in the recognition therein by this court that Section 63(b) of the Bankruptcy Act (11 U. S. C. A., § 103), which provides for the liquidation of claims in such manner as the bankruptcy court may direct, invests that court "with *discretionary power* that can be fitted to the needs of varying situations" (300 U. S. 598, 605). This is directly contrary to petitioners' present contentions, and was the basis of the action of the lower courts herein.

CONCLUSION.

Because the petition herein is not limited to matters usually contained in petitions for certiorari, but also includes extended arguments relating to the *merits* of the action of the lower courts, respondent has included herein answers to all of such arguments. On this record, even if certiorari should be granted herein, the action of the lower courts would have to be affirmed.

Respondent respectfully submits that the Petition for Writ of Certiorari shold be denied because:

(1) Petitioners have failed to point out any conflict between the decisions of the Court of Appeals herein and decisions of this court or other Courts of Appeals.

(2) The choice between the method of terminating this bankruptcy, which was approved by the Court of Appeals, and the method contended for by petitioners is not of general importance or of great public interest.

(3) The bankrupt herein is solvent—with no unpaid creditors—and any decision on the merits would be of narrow and limited interest.

(4) Petitioners are, in reality, seeking a review of the decisions below on the sole ground that they are erroneous. *Magnum Import Co. v. DeSpoturno Coty,* 262 U. S. 159, 163.

Respectfully submitted,

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Armin F. Hillmer.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 445

IN THE MATTER OF
GEORGE R. JOSLYN,
BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,
vs.
GEORGE R. JOSLYN, et al.,
Respondents.

Petition for Writ of Certiorari.

REPLY BRIEF
OF PETITIONER, THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,

IN REPLY TO
BRIEFS IN OPPOSITION OF GEORGE R. JOSLYN, ARMIN F. HILLMER AND WADE FETZER, JR., ET AL.

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I.

The Conflict of Jurisdiction.

In all three briefs the state court order entered July 18, 1951 is treated as though it merely liquidated an unliquidated liability of the bankrupt. (Joslyn brief, pp. 7-9; Hillmer brief, pp. 6-10; Fetzer *et al.* brief, pp. 5-7).

The liability was not unliquidated. Its principal amount was formally admitted in the bankruptcy proceeding: the bankrupt scheduled it (Tr. 374-5); he admitted it in subsequent verified pleadings (Tr. 67-8, 119); and his counsel admitted it in a hearing (Tr. 72). This principal amount of the liability was never questioned by any party to the proceeding.

Nor did the state court make a judicial adjudication of the liability. The judge thought he was entering a consent order approved orally and in writing by counsel representing all parties (Tr. 396). He was misled to believe that all parties and interests were represented before him (Tr. 396).

Furthermore, the state court went far beyond purporting to determine the amount of the bankrupt's stock liability. It permanently enjoined the creditors from prosecuting their claims in the bankruptcy proceeding (Tr. 352, 357-8). It directed that the money be paid to the state court receiver, and distributed $50,972.79 of the $57,100.00 to Fetzer *et al.* (and their attorneys) (Tr. 260-267, 391-2). Fetzer, *et al.* were *shareholders,* not *creditors,* of the bank, and admitted in a verified answer in the bankruptcy proceedings that they were not creditors of the bankrupt (Tr. 315; see also Tr. 260-267; 391-2).

Respondents' argument as to *jurisdiction* is that because "the Superior Court retained jurisdiction *for the purposes*

of said class suit'' (Joslyn brief, p. 7), it also retained jurisdiction to wipe out and extinguish the provable claims against the bankruptcy estate (Fetzer, *et al.* brief, p. 9). (Inconsistently, the Fetzer *et al.* brief (p. 7) also argues that the state court order "did *not* adjudicate a claim against the bankrupt's estate.")

We are not concerned on this appeal with the question whether the state court did or did not have "jurisdiction *for the purposes of said class suit.*" This is not an appeal from the state court order. What we *are* concerned with is the order appealed from in the bankruptcy court which held that the bankruptcy claims were "extinguished by the state court order" as respondents' briefs maintain.

Clearly, if the bankruptcy court had paramount and exclusive jurisdiction to adjudicate the bankruptcy claims, as the unanswered and undisputed cases from this Court and the other Federal courts cited in our brief conclusively show (p. 26-7), then even if the state court "retained jurisdiction *for the purposes of said class suit,*" nevertheless the paramount and exclusive jurisdiction of the bankruptcy court over the allowance and satisfaction of the bankruptcy claims takes precedence over such retained jurisdiction in the state court and compels the conclusion that the bankruptcy order appealed from is in conflict with the Federal Constitution and Bankruptcy Act, and the Federal cases cited in our brief.

All of Respondents' opposition briefs ignore the following crucial facts: (1) that the consent order in the state court purported to extinguish and satisfy all the bankruptcy claims and enjoin their prosecution in the bankruptcy court; (2) that the District Court accepted the state court order as having such effect in bankruptcy and the Court of Appeals affirmed; (3) that the bankruptcy

creditors had been deprived of their right to interest against the "solvent" bankruptcy estate under bankruptcy law in the bankruptcy court; and (4) that the moneys distributed in the state court were largely paid to persons (Fetzer, *et al.*) who were not bankruptcy creditors at all, and whose claims were never asserted, and in fact never arose, until long after the bankruptcy adjudication.

All three briefs in opposition also ignore the following significant facts: 1) that before the bankrupt's attorney filed the father's petition in the state court suit (on July 12, 1951, Tr. 245-7) the bankrupt had submitted to the bankruptcy court for adjudication the amount of his stock liability and the interest issue (on June 30, 1950) (Tr. 67-70); 2) that, likewise before the filing of the father's petition in the state court suit, the bankruptcy court had: a) on June 30, 1950 exercised its jurisdiction to adjudicate these issues by referring them to a referee (Tr. 67), who conducted a hearing and filed a report on them (Tr. 127-183); b) taken the referee's report under advisement on April 20, 1951, and had it under advisement when the father's petition was filed in the state court suit (Tr. 242); and 3) that the state court had formal notice of the bankruptcy proceeding both through the filing of the bankrupt's answer pleading his discharge in the state court suit (Tr. 355-6), and by reason of the restraining order entered May 20, 1946 by the bankruptcy court (Tr. 385). [That the state court judge had actual knowledge of the bankruptcy proceeding when he entered the order of July 18, 1951 is shown by his statement at Tr. 390.]

The foregoing shows the irrelevance of §§ 11a and 63 of the Bankruptcy Act (11 U.S.C. §§ 29 and 103). The former merely authorizes a stay of state court proceedings until adjudication and discharge, or until dismissal of a bankruptcy petition; the latter refers specifically to judg-

ments entered prior to the bankrupt's discharge. Obviously neither is pertinent to this case.

The foregoing also shows the irrelevance of the following cases cited in the opposition briefs:

Cases not involving jurisdiction in bankruptcy: *Holley* v. *General American Life Ins. Co.*, 101 F. 2d 172; *Cooper* v. *Reynolds*, 77 U.S. 308; *Higginson* v. *Schoeneman*, 190 F. 2d 32; *Groves* v. *Farmers State Bank*, 368 Ill. 35; *Decker* v. *Domoney*, 387 Ill. 524; *Babka Plastering Co.* v. *City State Bank of Chicago*, 264 Ill. App. 142; *Leonard* v. *Bye*, 361 Ill. 185; *Walton* v. *Albers*, 380 Ill. 423; *Goldfarb* v. *Wright*, 135 F. 2d 188.

(The *Goldfarb* case is the only one which involves a bankruptcy proceeding; and it does not concern any conflict of jurisdiction. The bankruptcy proceeding had been dismissed before the filing of the state court suit; and the question at issue was whether or not the District Court should reopen the proceeding.)

Cases in which a trustee or assignee in bankruptcy voluntarily subjects himself to the jurisdiction of a state court by appearing therein to protect the interests of the estate: *In re McNulty*, 13 F. 2d 754; *Norton* v. *Switzer*, 93 U.S. 355; *In re Anton*, 11 F. Supp. 345.

Case involving the provability, in bankruptcy, of claims based on judgments rendered in other tribunals. *U. S.* v. *Paddock*, 180 F. 2d 121.

Cases in which the bankruptcy court authorizes the submission to state courts of unliquidated claims, where the interests of the estate will best be served thereby: *In re Martin*, 288 Fed. 184; *In re Buchan's Soap Corpn.*, 169 Fed. 1017. In the case at bar the bankrupt's stock liability was liquidated by his own admissions and pleadings in the bankruptcy proceeding.

Cases in which a bankrupt seeks relief from a state court judgment entered in a suit in which he has neglected to assert his discharge as a defense: *In re Innis,* 140 F. 2d 479; *Dimock* v. *Revere Copper Co.,* 117 U.S. 559. No such issue is present in the instant case; and the bankrupt did plead his discharge in the state court suit (Tr. 355-6).

Cases involving property in possession of a state court, attachments, or foreclosure of liens in a state court: *In re Tinkoff,* 141 F. 2d 731; *Davis* v. *Friedlander,* 104 U.S. 570; *Peck* v. *Jenness,* 7 How. 612; *Eyster* v. *Gaff et al.,* 91 U.S. 521; *Metcalf* v. *Barker,* 187 U.S. 165; *Town of Agawam* v. *Connors,* 159 F. 2d 360; *Connell* v. *Walker,* 291 U.S. 1. In the present case no property was in the possession of the state court, and no attachment or foreclosure was involved.

Cases involving the question whether a discharge in bankruptcy is a defense to a particular state court judgment or suit: *In re Devereaux,* 76 F. 2d 522; *Walters* v. *Wilson,* 142 F. 2d 59; *Hobbs* v. *Franklin Jewelry Co. Inc.,* 131 F. 2d 432; *In re Armour,* 186 F. 2d 503; *Boynton* v. *Ball,* 121 U.S. 457. No such question arises here.

The other cases cited by respondents on this subject are too far afield to require comment. None of them controvert the fundamental principles of law, establishing the paramount and exclusive jurisdiction of the bankruptcy court, cited in our brief, which are neither challenged nor answered in the opposition briefs.

The argument (Joslyn brief, pp. 9-11) that under the provisions of 28 U.S.C. §1738 the District Court was bound by the state court order, is fallacious. That enactment merely establishes a rule of evidence, not one of jurisdiction: *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265, 291 (1887);

People v. *Bruce,* 129 F. 2d. 421, 424 (C.C.A. 9th C. 1942), cer. den. 317 U.S. 678, rhrg. den. 317 U.S. 710. The question of jurisdiction is not foreclosed: *Milliken* v. *Meyer,* 311 U.S. 457 (1940); *Cook* v. *Cook,* 342 U.S. 126 (1951); *Sutton* v. *Leib,* 342 U.S. 402 (1951).

II.

Whether the Elks Is a Bankruptcy Creditor.

The Joslyn brief asserts (p. 1-3) that petitioner is not a creditor of the bankruptcy estate, citing the referee's report (Tr. 170-3).

This statement can scarcely be sincere, in view of the decision of the United States Court of Appeals in *In re Joslyn's Estate,* 171 F. 2d 159, 166-8 (C.A. 7th 1948-9). That Court said (p. 167, 168):

> "The question is not whether the Elks can maintain an action at law in the state court to recover on Joslyn's stock liability, but whether it has a provable claim in bankruptcy.
>
> "That it has such a claim is hardly to be doubted, both under the Federal and Illinois decisions. (citing *Brown* v. *O'Keefe,* 300 U.S. 598).
>
> * * *
>
> ". . . It is our view that the Elks has a provable claim in the bankruptcy proceeding, and we so hold."

No issue as to the provability of the Elks' bankruptcy claim was ever referred to the referee (Tr. 67-9, 72), and no hearing was ever had and no evidence upon the provability of the Elks' bankruptcy claim, or that of any other bankruptcy creditor, was heard by the referee. The referee's comments quoted from his report (Tr. 173) were made in connection with consideration of the petition of Fetzer, *et al.* also referred to him (Tr. 102); and signify merely that in the hearings before him no evidence was

submitted from which he could determine what bank creditors had claims against what stockholders, to which claims Fetzer, *et al.* would be subrogated under the theory of their petition mentioned by the referee at Tr. 159.

The other opposition briefs are more candid than the Joslyn brief by contending, not that the Elks was and is not a bankruptcy creditor, but that it ceased to be a creditor solely by reason of the state court order (Hillmer brief, p. 2, 6-9; Fetzer, *et al.* brief, p. 4, 8-9). The same argument is also made in the Joslyn brief (p. 9-12), where it is admitted that the creditors of the bank (necessarily including the Elks) held claims against the bankrupt; but there it is argued that under Illinois law the state court order and injunction were within the jurisdiction of the state court, and must be given full faith and credit in the bankruptcy court.

The class suit is, no doubt, a proper mechanism under Illinois law for enforcing the stockholders' liability; but while the amount of such liability is limited to the total amount of the bank liabilities accruing during the prescribed period, nevertheless the liability is a direct one to each creditor of the bank (including the Elks). This was the holding in *In re Joslyn's Estate,* 171 F. 2d 159, 166-7, and *Brown* v. *O'Keefe,* 300 U.S. 598, there cited. It is clearly the Illinois law: *Decker* v. *Domoney,* 387 Ill. 524, 527 (1944); *Burnett* v. *West Madison State Bank,* 375 Ill. 402, 406 (1940); *Burket* v. *Reliance Bank & Trust Co.,* 367 Ill. 196, 201 (1937); *Golden* v. *Cervenka,* 278 Ill. 409, 435-6 (1917).

In its opinion in the *Decker* case the Supreme Court of Illinois correctly states (p. 527): "Such liability does not accrue to the bank, but to the creditors, and the creditors of the bank, *either alone or by representative suit,* are the only

ones who can enforce the liability . . . *It is a several and individual liability on the part of each stockholder to each creditor.*" (Italics added.)

The United States Court of Appeals for the Seventh Circuit recognized that this was the law of Illinois in *Reconstruction Finance Corporation* v. *Barrett,* 131 F. 2d. 745 (1942) at page 748.

The class suit was nothing more than such a mechanism under the state statute for enforcing the individual liability of each stockholder to each creditor.

The wording of the last full paragraph on page 9 of the Hillmer brief implies that the Elks or its counsel had knowledge of the proceedings in the state court before the "satisfaction and release" of the bankrupt's liability. We do not believe counsel intend this implication as they well know otherwise.

On page 2 of the Joslyn brief counsel refer to a recent amendment of the Illinois Constitution abolishing double liability of holders of bank stock, but do not mention the express reservation of rights of creditors existing at the date of its adoption. (See Appendix, p. 16 of Joslyn brief).

The statement in the heading of point IV, p. 10, in the Joslyn brief misstates the facts. The state court order of September 20, 1951 did not deny the Elks' motion to vacate the decree of July 18. It denied the Elks' motion for leave to file its petition (Tr. 294).

The injunction order referred to under this point (by which the state court attempted to restrain the Elks and others from protecting their rights in the bankruptcy proceeding) illustrates the sharp issue of jurisdiction between the state court and the federal court which is presented by this case. This issue is one which this Supreme Court

should decide. If this Court fails to decide it, state courts can, and no doubt will, effectively nullify the rights of creditors in bankruptcy by so enjoining them from asserting their rights in the bankruptcy courts.

Under Point V the Joslyn brief argues (p. 12) that a distribution by the state court receiver would be fair while the distribution in the bankruptcy proceeding would not.

In the first place, the distribution actually made by the state court receiver paid $50,972.79 of the $57,100.00 to persons [Fetzer *et al.* and their counsel] who were not creditors of the bankrupt (Tr. 260-267; 315; 391-2). That was not an "equal and ratable" distribution as required by the bankruptcy law.

In the second place, the very function of a bankruptcy proceeding is to collect assets and make distributions in accordance with the act.

In the third place, this function is exclusively one of the bankruptcy court under its paramount jurisdiction.

Under the Bankruptcy Act, no single creditor or group of creditors can appropriate the bankruptcy assets to the exclusion of the others, as was done by the state court in this case.

It cannot be effectively denied therefore that the state court order would, if valid, prevent a proper distribution in this case, or that by the bankruptcy court's order based thereon the equal and ratable distribution required under bankruptcy law was effectively defeated in defiance of the fundamental principles of bankruptcy law.

III.

The "Equitable Attachment" Theory.

The Joslyn brief argues (p. 13-4) that the state court order "effected an equitable attachment" on the bankrupt's stock liability. No such argument is contained in the other opposition briefs.

The cited case of *Sanders* v. *Merchants State Bank*, 349 Ill. 547, 551-5 (1932), holds that under the present Illinois Constitution the filing of the representative stockholders' suit does not effect such an equitable attachment under Illinois law. As stated in the opinion, the much earlier case of *Thebus* v. *Smiley*, 110 Ill. 316, 319-320 (1884), was decided under a special bank charter which created a stockholder's liability entirely different from that imposed by the present Illinois Constitution, under which the Chicago Bank of Commerce was chartered, and which was construed in the *Sanders* case. The *Thebus* case held that, under that early charter, each individual stockholder was liable to be sued by each individual bank creditor; from which it followed that in the race for priority, the diligent creditors were rewarded with a prior right in the nature of an equitable attachment as against other more dilatory creditors. But as the *Sanders* opinion points out, all this was fundamentally changed by the adoption of the Illinois Constitution of 1870, which prevented any "prior lien" or "equitable attachment" being procured by any individual bank creditor against any individual bank stockholder.

IV.

The Illinois Divorce Case of Joslyn v. Joslyn, 337 Ill. App. 443.

The opposition briefs of Joslyn and Fetzer, *et al.* attempt to confuse the issues in this case with the divorce case of

Joslyn v. *Joslyn*, 337 Ill. App. 443. (Joslyn brief, pp. 4, 14-15; Fetzer, *et al.* brief, p. 10-11).

This reference to the Joslyn divorce case is a mere red herring and has no bearing upon any issues before this Court.

Likewise the reference to a claim upon alimony assignments is wholly irrelevant to this proceeding. It merits reply only because of the slur it casts upon the Elks' counsel. The claim was not, as there stated, one of the attorneys for the Elks. There is no such "claim of the attorneys for the Elks" as is mentioned on page 14 of the Joslyn brief. The issue in the cited Illinois Appellate Court case was solely whether the trial court, in a bitter divorce suit between the bankrupt and his wife, had erred in allowing counsel fees and expenses to one Fisher, as her attorney in the divorce case. This question did not concern the lien claim referred to, which was a claim against the wife, not the husband. Fisher was also counsel for the Elks and other creditors in the bankruptcy proceedings; but his claim against the wife was for services rendered her in the divorce case. If this Court regards this subject as pertinent, we ask that it read the opinion of the United States Court of Appeals in the case of *In re Fisher*, 179 F. 2d 361 (C.A. 7th C. 1950) cer. den. 340 U.S. 825. In that decision the Court of Appeals reviewed the entire matter and freed Fisher from the blame cast upon him, saying (179 F. 2d at p. 369) with respect to him:

> " . . . Respondent by his industry and energy not only uncovered and exposed but obtained an adjudication that Joslyn's discharge in bankruptcy was fraudulent. With little assistance and much opposition he sought to cause the bankrupt's beneficial interest in the trusts turned over to the bankruptcy Trustee for administration. On three different oc-

casions either the respondent or the position for which he stood has been vindicated by this court and now, ironically enough, he finds himself disbarred for a period of three years, and this without any finding of evil intent or bad faith, and without proof of injury to any person other than the one who has been adjudicated a fraudulent bankrupt. While the heart of the charges made against respondent is that he acted in a dual capacity for his own financial benefit, not a single word of complaint has been uttered against him, so far as we know, either as a witness or otherwise, by Mrs. Joslyn or her attorneys, or by the Elks or any of its representatives, or by any creditor of the bankruptcy estate."

V.

The Question of Interest.

The Hillmer and Fetzer, *et al.* briefs maintain that no interest is involved in this case, because no interest is allowable upon stockholders' liability under Illinois law and the Federal bankruptcy court is bound thereby, even though the bankruptcy estate is "solvent" (Hillmer brief, p. 11-2; Fetzer, *et al.* brief, p. 8-9). However, the Fetzer, *et al.* brief admits (p. 8) that interest is allowable upon stockholders' liability "where equitable considerations are shown to warrant the imposition of interest." (The Joslyn brief ignores the subject of interest entirely.)

The question whether or not interest is collectible upon bankruptcy claims in a "solvent" bankruptcy, before the surplus is available to the bankrupt, is a federal question within the exclusive jurisdiction of the bankruptcy court. The issue now before the Supreme Court is not whether interest is chargeable in this case, but whether or not the order of the Court of Appeals should be reviewed because (among other things) it affirmed an order of the District

Court whereby that court treated as valid and binding on it an order of the state court purporting to adjudicate the bankruptcy claim without interest, in violation of bankruptcy law.

The following cases cited on p. 12 of the Hillmer brief all recognize that under Illinois law interest is chargeable on bank shareholders' liability if (as in the present case) there be unreasonable and vexatious delay of payment or other circumstances (such as fraud) making the allowance of interest equitable: *Lewis* v. *West Side Trust & Savings Bank,* 376 Ill. 23. (In this decision it is expressly pointed out (p. 46) that there was "no claim of fraud . . . as a reason for allowance of interest"); *Cohen* v. *North Avenue State Bank,* 291 Ill. App. 558, 569-570; *Reconstruction Finance Corporation* v. *Goldberg,* 143 F. 2d 752, 759-761 (C.A.A. 7th C. 1944).

The other cases cited by respondents do not support their arguments.

In *Hillmer* v. *Block,* 315 Ill. App. 134, interest was denied specifically on the ground that it would be inequitable to allow it under the particular facts of that case.

The cases *Sanders* v. *Merchants State Bank,* 349 Ill. 547 and *Heine* v. *Degen,* 362 Ill. 357, do not deal with the question of interest. They merely refer to the principal amount of liability as the face value of the shares. That this does not negative interest is shown by the later decision in the *Lewis* case.

Munger v. *Jacobson,* 99 Ill. 349, was based upon a special charter issued before the adoption of the present Illinois constitution. The provisions of the charter are not reported. If pertinent, this decision is inconsistent with the *Lewis* case, in which the court particularly pointed out

(376 Ill. p. 47) that the *Munger* case involved a special charter and did not pass upon the question of interest under the present Illinois constitution.

The case of *Garvey* v. *Wilder,* 121 F. 2d 714, cites only the *Munger* decision to support the erroneous statement that "Illinois decisions hold that there is no liability for interest on stockholders' assessments."

Under Illinois law, liability for interest is not based solely on statutory provision, as argued on page 12 of the Hillmer brief.

Duncan v. *Dazey,* 318 Ill. 500, 527 (1925).
Golden v. *Cervenka,* 278 Ill. 409, 433 (1917).

We quote the following from the opinion in the *Golden* case (p. 433):

> "Neither the bill nor the cross-bill makes any claim for interest, and the case is not one of those in which the statute provides that interest shall be allowed. In equity, however, interest is allowed because of equitable considerations, and is given or withheld as under all the circumstances of the case seems equitable and just. (*Keady* v. *White,* 168 Ill. 76.) The Central Trust Company having received funds which belonged to the trust and savings bank, if it retained them without authority of law, should account for interest from the time a demand was made for payment, which was when the cross-bill was filed. *Whittemore* v. *People,* 227 Ill. 453."

But the fact that interest is allowable *under Illinois law* upon stockholders' liability in cases of fraud and vexatious delay (such as the present case) is really not relevant. The important point is that *under federal law* interest is allowed upon bankruptcy claims in proceedings in which there is a surplus returnable to the bankrupt. (See our brief in support of the petition, p. 27, second paragraph).

CONCLUSION.

The opposition briefs confirm the importance of a review by the Supreme Court of the Court of Appeals decision in this case. They demonstrate the extent to which the administration of estates in bankruptcy will depart from the provisions of the Bankruptcy Act if bankruptcy courts can lawfully abdicate their paramount and exclusive jurisdiction to state courts. They confirm our position, that the decision of the Court of Appeals defeats this paramount and exclusive jurisdiction, and constitutes a precedent destructive of the lawful administration of future bankruptcy proceedings by the Federal courts.

The writ of certiorari should issue.

Respectfully submitted,

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

by .....

JOHN S. MILLER,
Attorney for Petitioner.

24

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FILED
JAN 26 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

VS.

GEORGE R. JOSLYN, *Et Al.,*
Respondents.

REPLY BRIEF
OF PETITIONERS, NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
IN REPLY TO
BRIEFS IN OPPOSITION OF GEORGE R. JOSLYN, ARMIN F. HILLMER AND WADE FETZER, JR., ET AL.

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I.

The Conflict of Jurisdiction.

The Joslyn Brief completely ignores the fundamental issue in this case, to-wit: the conflict of jurisdiction between the Bankruptcy Court, on the one hand, and the State Court, on the other.

Both of the other opposing briefs discuss this fundamental issue, but conclude by pretending that there is "no conflict of decisions" between the order appealed from and the basic principle of exclusive bankruptcy jurisdiction which constitutes the very core of Federal Bankruptcy Law. This basic issue cannot be escaped by pretending it does not exist (Hillmer, p. 17; Fetzer, p. 7, 10), or that it has no "peculiar gravity or general importance" of "public interest."

Both the Hillmer Brief (p. 8-9, 11-16) and the Fetzer Brief (p. 6-8) argue that the State Court had "jurisdiction over *the person* of the bankrupt", and conclude therefrom that the Bankruptcy Court was compelled, or at least had the "discretion," to cease further administration of the claims and estate in bankruptcy, upon the basically erroneous theory that the State Court order satisfied and discharged the bankruptcy claims against the unadministered bankruptcy estate. As the Hillmer Brief expresses it (p. 13), the State Court judgment was merely a judgment *in personam* "as distinguished from a proceeding *in rem*," citing *Callaway* v. *Benton*, 336 U.S. 132; *Nathanson* v. *N.L.R.B.*, 344 U.S. 25; *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478; *Dimock* v. *Revere Copper Co.*, 117 U.S. 559, the latter as "decisive of the issues herein" (Hillmer Brief, p. 12-14).

None of the cases so cited supports Respondents' arguments. In the *Callaway* case, this Court concluded "under the narrow facts presented here" that the Bankruptcy Court did not have exclusive jurisdiction over a controversy which "does not involve property of the debtor within the jurisdiction of the Bankruptcy Court," in a railroad reorganization case. The *Nathanson* case, as stated in our Petition (p. 13-14), held that the Bankruptcy Court does not have exclusive jurisdiction over a controversy

which could only be properly settled before the National Labor Relations Board. The *Thompson* case was one in which the Bankruptcy Court itself directed the Trustee in Bankruptcy to litigate an issue of state law in a State Court involving a question of title to local land.

As for the *Dimock* case, the issue was whether the Massachusetts State Court had jurisdiction to render a money judgment *in personam* against the bankrupt after bankruptcy and after discharge, in which State Court suit the bankrupt failed to assert the discharge. No bankruptcy question was involved. It was correctly held, as in many other similar cases, that the State Court had jurisdiction to render a money judgment *in personam* against the bankrupt outside of the Bankruptcy Court and after bankruptcy, in the absence of an assertion of his bankruptcy discharge, and that this Massachusetts judgment was entitled thereafter to full faith and credit in the New York Court, in which the *Dimock* case arose.

Plainly, none of these cases is relevant or "decisive" here, for in none of them did the Bankruptcy Court treat (as it did here) a State Court judgment, entered in a proceeding to which the Trustee was not a party, as conclusive upon the Bankruptcy Court to terminate the bankruptcy administration and prevent (1) the collection of bankruptcy assets, (2) the assertion and adjudication of bankruptcy claims, and (3) the distribution of the administrable bankruptcy assets in accordance with bankruptcy law.

The Hillmer Brief argues (p. 12-13) that, since the Bankruptcy Court obviously has some limited "discretionary powers" over the bankruptcy administration within the Bankruptcy Court, there is no conflict of jurisdiction between the Federal and State Courts in the case at bar, because the Bankruptcy Court exercised its discre-

tion "not to *interfere with the State Court proceedings.*" This is untrue; the Bankruptcy Court never exercised any such discretion in this case. The "interference" was with the Bankruptcy Court, not the State Court. No one ever asked the Bankruptcy Court to interfere with the State Court proceedings, nor did the Bankruptcy Court ever attempt to do so.

The issue is whether the Bankruptcy Court had the power to surrender its paramount and exclusive bankruptcy jurisdiction to the State Court. Certainly it had no "discretion" to abdicate its functions merely because it obviously had discretionary powers to control the bankruptcy administration within the Bankruptcy Court itself, under such provisions of the Bankruptcy Act as Section 11(b) and (c) and Section 63(b), to which Hillmer's Brief refers (p. 12). This is the real issue, and it is not referred to in any of the cases cited in the Hillmer or Fetzer Briefs.

The attempt in the Hillmer Brief (p. 15) to distinguish the leading cases a few of which are cited in the Petitioners' Brief (p. 13) dealing with the paramount and exclusive jurisdiction of the Bankruptcy Court is based upon irrelevant matters and differences in each instance and ignores the fundamental principle of exclusive jurisdiction in bankruptcy upon which these leading cases were decided. Moreover, none of Respondents' Briefs mentions the other important cases cited on pages 26-7 of the Petitioners' Brief in No. 445, although these added cases were also incorporated in both our Petition (p. 2) and supporting Brief (p. 12), in this cause No. 501.

The fundamental issue in this case is whether the Federal Bankruptcy Court had power or discretion to surrender its paramount and exclusive jurisdiction in bank-

ruptcy matters to the Superior Court of Cook County, Illinois, and the effect to be given to the latter's *in personam* judgment in the bankruptcy case. The Hillmer Brief squarely concedes that this conflict of jurisdiction is the "basic question" in stating the "Question Presented" (p. 6; also p. 8). The fact that the Joslyn Brief ignores this fundamental jurisdictional conflict, whereas the Fetzer Brief (p. 10) confesses that it cannot comprehend it, and the Hillmer Brief concludes by denying that such conflict exists (p. 17), merely shows the irrelevancy and inadequacy of the other points contained in Respondents' Briefs.

Our Points II to VI below serve only to meet the inconsequential and immaterial matters contained in the Respondents' respective opposing briefs.

II.

Respondents' Argument that New Jersey Equities Company is not a Bankruptcy Creditor.

Each of Respondents' Briefs argues that New Jersey Equities Company is not a bankruptcy creditor, and attacks the sufficiency of its bankruptcy claim (Tr. 335-6).

This contention is both irrelevant and without merit. It is irrelevant because, even if New Jersey Equities Company were not a bankruptcy creditor, the Petition in No. 501 is also filed by Horace A. Young, as Trustee in Bankruptcy, on behalf of all of the other bankruptcy creditors, including not only the Elks (Petitioner in No. 445), but also all of the other bankruptcy creditors whose bankruptcy claims are filed and still pending (with one exception), as well as those claims still to be filed, in the Bankruptcy Court. These other bankruptcy creditors who have already filed claims are Charles Ralph Johnston, Dr. Morris L. Parker, Vaughan Seed Store, Peter Bankson, Lewis E.

Pennish, Thomas B. McMartin, Edward J. Hargrave and George E. Hargrave, all of whom are Appellants herein (Tr. 403). The only creditor not appealing is Armin F. Hillmer.

As for the validity of the New Jersey Equities Company claim, the claim itself is in proper form, being filed upon standard Bankruptcy Form No. 29 (Tr. 335-6). No hearing *upon this claim or any other claim* has ever been had in the Bankruptcy Court (Tr. 142, 155), although the Trustee in Bankruptcy attempted unsuccessfully to secure an order of general reference for this purpose (Tr. 88-9, 127-8).

The Hubbard Brief (p. 6) and the Fetzer Brief (p. 2) argue that the New Jersey Equities Company's claim was filed without leave of the Bankruptcy Court and without notice to anyone. This contention is without merit. Bankruptcy claims are regularly and customarily filed with the Clerk of the Bankruptcy Court without leave or notice to anyone, under General Order II. There is no requirement in Section 57 of the Bankruptcy Act that any leave be obtained or any notice of the filing of claims with the Clerk of the Bankruptcy Court be given to anyone. As an ordinary matter of routine bankruptcy practice, tens of thousands of bankruptcy claims are regularly filed with the Clerk of the Court without leave or notice to anyone, many of such claims being filed by mail.

Both the Hubbard Brief (p. 7) and the Fetzer Brief (p. 3) attack the New Jersey Equities Company's claim upon the ground that no affidavit by the assignor is attached thereto as required by General Order No. XXI(3); and the Joslyn Brief also cites the pleading requirements under the Illinois Civil Practice Act where suits in the State Court are brought upon assigned claims. However, both

Briefs concede that General Order No. XXI(3) does not apply unless the claim was assigned after bankruptcy, which neither Brief alleges is the situation here.

As for the contention that the claim does not comply with the Illinois pleading law, be it said the Illinois Civil Practice Act has no applicability to bankruptcy claims, the form of which, as well as the manner of filing, is wholly governed by bankruptcy law.

Both the Joslyn Brief (p. 7-11) and the Fetzer Brief (p. 3-4, 8-9) argue that the New Jersey Equities Company has no provable bankruptcy claim because its claim against the Chicago Bank of Commerce did not accrue while George R. Joslyn was a stockholder, citing and quoting from *Holderman* v. *Moore State Bank*, 383 Ill. 534 at p. 540. This argument misapprehends the Illinois law. The Illinois courts do hold, as the *Holderman* case says, that *the measure of the total amount of each stockholder's liability* in a closed Illinois bank is limited to the total amount of the bank creditors' claims accruing during the period of stock ownership by each such stockholder; but once the *total amount of each stockholder's liability* has been thus determined and collected, *then such total amount must be ratably distributed among all of the bank creditors regardless of when their claims accrued. Heine* v. *Degan*, 362 Ill. 357; *Burket* v. *Reliance Bank and Trust Co.*, 366 Ill. 98; *Hillmer* v. *Chicago Bank of Commerce*, 375 Ill. 266; *Cohen* v. *North Ave. State Bank*, 291 Ill. App. 558; *Holderman* v. *Moore State Bank*, 383 Ill. 534, 543.

We quote from the paragraph in the *Holderman* case immediately preceding the quotation therefrom in the Fetzer Brief (p. 8-9):

> "It is true that under *Heine* v. *Degan, supra,* the moneys collected from the stockholders *must be distributed ratably to all the creditors, and not merely to those whose claims arose during the period of their stock ownership.*" (Italics added.)

The Referee correctly stated the Illinois law governing the ratable distribution of moneys collected from the stockholders among all of the bank creditors, as follows (Tr. 173):

> "The manner of distribution provided by Illinois law is an altogether different matter and does not concern the bankrupt's liability. After liabilities of bank stockholders have been paid to the receiver in a representative creditors' suit, *the money must be distributed ratably among all creditors of the bank.* See *Cohen* v. *North Ave. State Bank,* 291 Ill. App. 558, where the Court said at page 566:
>
> > 'Under section 11 of the statutes above referred to, and other authorities, we are clearly of the opinion that the money collected by the receiver in the liquidation suit, whether from the stockholders of the bank or from other resources of the bank, *must be distributed ratably to all of its creditors.*'
>
> Also see *Heine* v. *Degan,* 362 Ill. 357." (Italics added.)

It thus appears that Respondents are confusing the manner of determining the total amount of the stockholder's liability, with the right of the individual bank creditors to share ratably therein, once such liability is determined and paid by the stockholder. This right is conceded in the Hillmer Brief (p. 3, lines 3-4). There is nothing to the contrary in the Illinois cases of *Zimmerman* v. *Zeimer,* 363 Ill. 220 or *Leonard* v. *Bye,* 361 Ill. 185, which are cited in the Joslyn Brief (p. 9-11).

The Joslyn Brief argues (p. 8) that paragraphs 4 and 8 of the New Jersey Equities Company claim "indicate" that the claim is "invalid," because the Illinois State Receiver (not the Receiver in the stockholders' representative suit) "had a statutory duty to prove all unproved claims", and no showing has been made in this record as to "why the Receiver failed to do his statutory duty to prove this purported claim if such claim ever existed."

There has been no opportunity for the Equities Company to prove its bankruptcy claim, because *neither its claim nor any other bankruptcy claim* has ever been heard or adjudicated upon the merits in the Bankruptcy Court (Tr. 88-9, 142, 155). Paragraph 4 of the sworn claim itself positively states that no part of the amount claimed has been paid, no claim therefor having been filed with the State Court Receiver nor any dividend ever received thereon (Tr. 335). This allegation in paragraph 4 (like all other allegations in the sworn claim) must be assumed to be true until the claim itself has been heard and adjudicated upon its merits in the Bankruptcy Court.

The Hillmer Brief (p. 2-3) and the Fetzer Brief (p. 2) argue that there is no evidence in the record to support the statement on pages 2-3 of our Petition that there are two groups of bankruptcy creditors in this case, to-wit: the so-called "non-participating bankruptcy creditors" holding bankruptcy claims which are presently totally unpaid in the sum of $1,207,155.10, including New Jersey Equities Company, and the so-called "participating bankruptcy creditors" holding bankruptcy claims totalling $1,182,161.98, including The Benevolent and Protective Order of Elks of the United States of America.

The argument is (Fetzer Brief, p. 2) that the Court of Appeals did not positively state, though it made reference thereto in its opinion (Tr. 425), that such groups of "participating" and "non-participating" creditors existed, but that this is merely asserted by Appellants. Fetzer argues (p. 2) that the allegations in the Trustee's sworn Petition to this effect (Tr. 275-6) are denied by Fetzer's sworn Answer thereto (Tr. 312); and that no offer of proof was made by the Trustee so that "The controverted allegations of the Trustee's petition cannot be taken as proof."

There are two answers to this argument. In the first place, as the Trustee's sworn Petition itself shows (Tr. 276), the facts there alleged as to the "participating" and "non-participating" creditors are derived from the findings of fact by the State Court in paragraphs 6 and 15 of the State Court order of July 18, 1951 (Tr. 349, 351). Moreover, the Bankruptcy Court's findings of fact (paragraph 20) state that there are "more than 12,000 creditors of the Chicago Bank of Commerce [*who*] *have participated* in the distribution of funds collected from the stockholders of the Chicago Bank of Commerce" (Tr. 380), and this is also substantiated by the Bankruptcy Court's written opinion (Tr. 368). The balance of the "30,000 other creditors" who are referred to in Fetzer's own sworn petition (Tr. 94) comprise those creditors who have *not participated* therein.

But even if the Trustee's sworn allegations were wholly unproven by anything in the record, nevertheless the trial court and the Court of Appeals correctly assumed the sworn facts to be true *for the purposes of this appeal,* because the judgment appealed from was rendered upon the bankrupt's motion for summary judgment (Tr. 367, 384), without any opportunity being granted to either the Trustee in Bankruptcy or the creditors themselves to prove these sworn facts. The Court of Appeals therefore necessarily treated the sworn allegations in the Trustee's Petition as true, for all allegations in sworn pleadings are deemed to be true where the party alleging them has had no opportunity to prove them, but has been cut off from such opportunity by reason of a summary judgment precluding such proof. It has always been the rule that where a demurrer is sustained to a sworn pleading, or where an affirmative defense thereto is sustained and decree rendered, both the trial and appeal courts are compelled to

assume the truth of the sworn allegations which the losing party has had no opportunity to prove. *Butcher* v. *United Electric Coal Co.*, 174 F. (2d) 1003 (7th C.C.A.). To the same effect is *Beal* v. *Mo. Pac. R. Corp.*, 312 U.S. 45, 51, 85 L. Ed. 577, 580.

What is said above is equally applicable to the as yet unproven bankruptcy claim sworn to and filed by the New Jersey Equities Company (Tr. 335-6), which shows in paragraph 4 that the claimant is a member of the group of "non-participating" bankruptcy creditors because "no part of said debt has been paid."

But whether or not the New Jersey Equities Company can ultimately prove its bankruptcy claim, or whether or not we have correctly stated the number and amount of bankruptcy claims as "participating" and "non-participating," the fact remains that no such challenge can defeat the right of the Trustee in Bankruptcy to represent *all creditors,* "participating" and "non-participating" alike. This fact, and the further fact that the validity of the bankruptcy claim of the Elks is not effectively challenged in No. 445, makes the attack upon the New Jersey Equities Company claim in Respondents' Briefs entirely immaterial to the present appeal in No. 501.

III.

Both the Hillmer Brief (p. 3-4) and the Fetzer Brief (p. 4-5) argue that the Trustee in Bankruptcy had actual knowledge that the stockholders' representative suit was pending in the State Court long prior to July 18, 1951 when the State Court Order was entered.

The Trustee's knowledge of this fact is not the point at issue, and is irrelevant. The point is that neither the Trustee in Bankruptcy nor any of the other bankruptcy

creditors, including the Elks and the New Jersey Equities Company, who are Appellants in this proceeding, *ever had any prior knowledge or notice of the particular State Court proceedings commencing with the notice of July* 12, 1951 (Tr. 353) *and including the order of July* 18, 1951 (Tr. 348), *which are involved in the instant case.*

In this connection, the Court will recall that the trial court Judge "very distinctly asked the question . . . if all the attorneys were before me" at the time the July proceedings occurred (Tr. 394), and that the Judge required all of the attorneys before him to evidence their consent to the order of July 18, 1951 (Tr. 353, 393).

The order itself as copied in the record (Tr. 353) shows conclusively that neither the bankruptcy creditors referred to, nor the Trustee in Bankruptcy, were before the State Court or gave any assent to the State Court order. Thus it becomes irrelevant whether the Trustee or the creditors knew that the representative suit existed, for the plain fact is that insofar as that suit could possibly affect the bankrupt, George R. Joslyn, or the bankruptcy proceedings, neither the Trustee in Bankruptcy, nor the creditors mentioned had any prior notice or knowledge of such State Court proceedings whatsoever.

The italicized sentence in the middle of page 5 of the Fetzer Brief stating that advance notice of the State Court order of July 18, 1951 was given to "all persons entitled thereto" is a deliberately slippery sentence, for Respondents themselves contend that neither the Trustee in Bankruptcy, nor the bankruptcy creditors who are Petitioners in Nos. 445 and 501, were "persons entitled to such notice."

There were many reasons why both the Trustee in Bankruptcy and the petitioning bankruptcy creditors were en-

titled to rely exclusively upon their rights and remedies in the Bankruptcy Court, and therefore had no obligation and did not attempt to participate in the State Court proceedings, even though the existence of the State Court represenative suit was known to them. Among these reasons are:

(a) On May 20, 1946, long prior to the year 1951, on the very day the fraudulent bankruptcy was reopened, an injunction order was entered in the Bankruptcy Court "enjoining all persons from in any manner prosecuting any action or suit against the bankrupt" (Tr. 268), and this injunction was in full force and effect from the date of its entry in 1946 to and subsequent to the date of the decree appealed from which was entered on November 8, 1951 in the Bankruptcy Court (Tr. 384). This injunction order was entered under Section 2a(15) of the Bankruptcy Act, at the request of the Elks as a bankruptcy creditor, "to preserve the Estate and to prevent loss thereto," as the injunction itself shows. Both the Trustee in Bankruptcy and all of the bankruptcy creditors were entitled to rely upon the effectiveness of this injunction in preventing any interference with the bankruptcy by the entry of the State Court order of July 18, 1951 in question.

(b) Under date of January 29, 1949, also long prior to 1951, the United States Court of Appeals for the Seventh Circuit had issued its mandate in the case of *In re Joslyn*, 171 F. (2d) 159, directing that the bankruptcy proceedings "continue in the usual course" (Tr. 27-8, 250), and holding that it was the Trustees' duty to collect the administrable assets in the plenary action (171 F. (2d) 159, at 168). This was confirmed by the same Court of Appeals in the case of *Young* v. *Handwork*, 179 F. (2d) 70, cert. den. 339 U.S. 949, reh. den. 339 U.S. 991, which held

early in the year 1950 that the Trustee's plenary suit to collect the administrable assets should be reinstituted in the trial court and should "proceed in accordance with the conclusion" that the title to the assets sought to be collected therein had passed to the Trustee in Bankruptcy as of the date of the voluntary adjudication "as administrable assets" (179 F. (2d) 70, at p. 80). The Trustee and all of the bankruptcy creditors were thereby entitled to assume that both the bankruptcy proceeding and the Trustee's plenary suit to collect the administrable assets would proceed thereafter without any interference by orders to be entered by the State Court in the stockholders' representative suit.

(c) Both the bankrupt and Fetzer, *et al.* as intervening creditors, voluntarily filed their petitions in the Bankruptcy Court long prior to July 18, 1951, seeking to have the Bankruptcy Court adjudicate the very same issues which were later to become secretly the subject of the State Court order of July 18, 1951 (Tr. 41, 67, 92). In his petition, the bankrupt was offering to settle and pay all of his bankruptcy creditors voluntarily by payments in the Bankruptcy Court (Tr. 71, 142, 149-150, 155, 179). The Trustee in Bankruptcy had filed long prior to July 18, 1951 an answer to the bankrupt's petition (Tr. 77) and an answer to the intervening petition of Fetzer, *et al.*, as well as a counterclaim seeking affirmative relief in the sum of $18,757.99 for the benefit of the bankruptcy estate (Tr. 107-118), which answer was also adopted by the Elks and all of the other bankruptcy creditors who are Appellants in this proceeding (Tr. 104-7). Both the bankrupt and Fetzer, *et al.* had filed replies to such answers and counterclaim (Tr. 118-126). These petitions had all been referred to the Referee (Tr. 67, 102), who after extensive hearings limited thereto had rendered a full Referee's Re-

port (Tr. 127-183), recommending that the bankruptcy claims should be paid through the Bankruptcy Court (Tr. 155). This Report was pending upon objections and exceptions (Tr. 225-240), which the Bankruptcy Court had taken under advisement on April 20, 1951 (Tr. 242), before the July 18, 1951 order was entered. Both the Trustee in Bankruptcy and the bankruptcy creditors were entitled to rely upon the bankruptcy law precluding those who have voluntarily invoked the paramount and exclusive jurisdiction of the Federal Bankruptcy Court from thereafter attempting to withdraw therefrom by proceedings in a State Court so as to oust the Bankruptcy Court of such jurisdiction. *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106; *In re Norris Holding Co., Inc.*, 52 F. (2d) 499; *Page* v. *Arkansas National Gas Corp.*, 53 F. (2d) 27, aff'd 286 U.S. 269.

(d) Armin F. Hillmer, who was himself one of the plaintiffs in the stockholders' representative suit in the State Court, had filed a bankruptcy claim in the Bankruptcy Court on May 22, 1946 purportedly acting "on behalf of himself and all other creditors of said bank similarly situated, against George R. Joslyn as a stockholder of said bank" (Tr. 3-4), in which claim he sought not only to recover the principal amount of $57,100, but also interest thereon "from June 25, 1932 until date of payment." Both the Trustee in Bankruptcy and the bankruptcy creditors were entitled to assume that this bankruptcy claim voluntarily submitted the issue as to the bankrupt's stock liability to the exclusive jurisdiction of the Bankruptcy Court in lieu of the State Court case.

(e) The bankrupt, Joslyn, as a defendant in the stockholders' representative suit, had not withdrawn his defense of discharge in bankruptcy, and in fact never did withdraw such defense, even at the time the State Court

order of July 18, 1951 was entered. Both the Hillmer Brief (p. 4, 10) and the Fetzer Brief (p. 5-6) erroneously maintain that it may be *inferred* that Joslyn was not relying upon his discharge as a defense after the fraudulent bankruptcy was reopened on May 20, 1946. There is nothing in the record to support any such inference, and it is contrary to the holding of the Court of Appeals in *In re Joslyn*, 171 F. (2d) 159 at 167. The bankrupt did not participate in the State Court proceedings when the July 18, 1951 order was entered (Tr. 246, 353), no doubt because he knew that he would be plainly violating the injunction entered in the Bankkruptcy Court on May 20, 1946, if he did so (Tr. 268).

We have been at pains to disclose the true reasons why neither the Trustee in Bankruptcy nor any of the bankruptcy creditors participated in the State Court proceedings involving the stock liability of the bankrupt. In the light of the foregoing facts, there was no obligation upon them to take any action to stay proceedings in the State Court, in spite of Respondents' arguments to the contrary (Hillmer Brief, p. 10; Fetzer Brief, p. 4-5).

IV.

The State Court order was a "consent" decree.

Both Hillmer (p. 4) and Fetzer (p. 5-6) argue that the State Court order was not a "consent" decree, but was a "judicial" decree. This is not only contrary to the statements by the State Court Judge (Tr. 393-4), but is shown to be erroneous by the fact that all of the counsel appearing in the State Court filed their written consent thereto (Tr. 353). Under Illinois law, the endorsing of a decree with the letters "O.K." or the word "approved" by the attorneys, or merely by their signing the decree or orally

assenting thereto, makes the decree a "consent" decree. *City of Kankakee* v. *Lang*, 323 Ill. App. 14, 17, 19; *Bergman* v. *Rhodes*, 334 Ill. 137; *Consaer* v. *Wisniewski*, 293 Ill. App. 529; *Hungarian Ben. Soc.* v. *Aid Soc.*, 283 Ill. 99.

Moreover, the transcript of the proceeding before the State Court Judge shows that he was merely sitting in the emergency court hearing emergency motions in the summer vacation, and that no actual evidence was offered or trial had before him (Tr. 388-395).

V.

The irrelevant charge of "blackmail".

The Joslyn Brief (p. 2-4) argues that the Trustee in Bankruptcy asserted an equitable lien on the bankruptcy estate in the Bankruptcy Court, and charges that this was part of a scheme "for the purpose of blackmail", citing certain remarks by Judge Shaw in the Bankruptcy Court. Both briefs again (also see Fetzer Brief, p. 7) drag in the irrelevant case of *Joslyn* v. *Joslyn*, 337 Ill. App. 443, in support of these contentions.

These charges are not only wholly irrelevant, but are also *conclusively disproved* by the decision of the Court of Appeals *which reviewed and reversed Judge Shaw*. We quote from the Court of Appeals in its opinion in 179 F. (2d) 361 at p. 368:

> "It was this proposed settlement [offered by the fraudulent bankrupt himself] that Judge Shaw characterized as 'blackmail.' But certainly it was not blackmail on the part of Fisher who was a stranger to this incident or upon the part of the Trustee in Bankruptcy who also was ignored. We need not relate the conditions which were attached to this proposed settlement but it is sufficient to note that it was such as to make it doubtful if any court would have approved such proposal even though it would have been agreeable to all concerned."

The Court of Appeals' decision in *In re Joslyn's Estate*, 168 F. (2d) 803 at 807 was to the effect that no such lien claim had ever been asserted in the Bankruptcy Court, which was the precise reason why the Court of Appeals reversed the trial court therein.

Moreover, it has never been the law that any lien claimant is barred from asserting his lien, if he wishes to do so, in a bankruptcy proceeding. Both the bankrupt himself (Joslyn Brief, p. 13-14 in No. 445) and Fetzer *et al.* (Tr. 41, 92; Fetzer Brief, p. 9) asserted lien claims in the bankruptcy proceedings. It is obviously one of the purposes of a bankruptcy proceeding to permit all claimants, whether they claim liens or are general or priority creditors, to assert their respective claims against the bankruptcy estate in the Bankruptcy Court. *That is what the bankruptcy case is for.*

VI.

Respondents' arguments assume that the State Court Order superseded the paramount and exclusive jurisdiction of the Bankruptcy Court.

Many of the Respondents' arguments are circuitous in that they assume the effectiveness of the order appealed from to terminate the bankruptcy proceedings in the Bankruptcy Court. In other words, they assume the point at issue.

For example, Hillmer (p. 2) argues that the New Jersey Equities Company is not a bankruptcy creditor upon the ground that all of the bankruptcy claims "have been fully satisfied and released" in the State Court, so that all of the claimants are no longer bankruptcy creditors (p. 17). Similarly, Hillmer argues (p. 5) that no interest is due the bankruptcy creditors, because they are no longer credi-

tors. From this the conclusion is drawn that no harm has been done the bankruptcy creditors and there is no public importance to this case (Hillmer, p. 7; Fetzer, p. 6-7), upon the ground that the State Court order "merged the stockholder's liability of the bankrupt," which "extinguished" the liability so that it was "satisfied in open court." Joslyn (p. 11) reaches the conclusion on the same basis that this case is "moot," because of the recent amendment to the Illinois Constitution.

As we have said, all of these arguments are circuitous in that they assume the point at issue. Of course, if the State Court order was binding upon the Bankruptcy Court, then the order appealed from should not be reversed. But the question in the case is whether the Bankruptcy Court had the right to abdicate its paramount and exclusive jurisdiction, and none of the Respondents denies that this conflict of jurisdiction between the Bankruptcy Court and the State Court is the very heart of this case.

We need pay no attention to Joslyn's statement in his "Conclusion" (p. 11) that the bankrupt's stock liability has been abolished by the recent Illinois constitutional Amendment. In effect he misquotes the amendment. The amendment itself (Joslyn Brief, No. 445, p. 16, Appendix) expressly preserves existing bank creditor's rights, and all of the bankruptcy claims in this case are preserved by this reservation.

CONCLUSION.

For the reasons stated above in this reply, Petitioners submit that Respondents' Briefs concede that the fundamental issue in this case is the important conflict of jurisdiction between the State Court and the Bankruptcy Court.

While we have been at pains to answer the arguments in Respondents' Briefs, we have not conceded their relevancy by so doing.

The decision herein appealed from constitutes a most dangerous precedent, seriously and adversely affecting the future administration of all bankruptcy proceedings in the Federal courts.

The writ of certiorari should issue as prayed in our Petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

Nos. 445 AND 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,
Respondents.

MOTION FOR WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, INJUNCTION, OR OTHER APPROPRIATE REMEDY, AND BRIEF IN SUPPORT THEREOF.

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MOTION FOR WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, INJUNCTION, OR OTHER APPROPRIATE REMEDY, AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioners, The Benevolent And Protective Order Of Elks Of The United States Of America (herein called the

"Elks") and Horace A. Young, as Trustee in Bankruptcy, respectfully present this motion as an emergency matter for the reasons shown below and show unto this Honorable Court as follows:

A.

Basis of Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. 1651 (a).

B.

Basis of Relief Sought.

(1) The Elks has heretofore filed in this Court as Docket No. 445 its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and Brief in support thereof, which Petition and Brief are incorporated herein by specific reference thereto. New Jersey Equities Company and Horace A. Young, as Trustee in Bankruptcy, have likewise filed in this Court as Docket No. 501 their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and Brief in support thereof, which Petition and Brief are incorporated herein by specific reference thereto.

(2) The principal issue raised in both of the foregoing Petitions for Certiorari is whether the decision of the United States Court of Appeals for the Seventh Circuit, affirming an order of the District Court, rends asunder the entire fabric of bankruptcy law so as to defeat the paramount and exclusive jurisdiction of the Bankruptcy Court in the bankruptcy proceeding of George R. Joslyn by abdicating its functions in favor of the State Court, and thereby establishes a precedent seriously and adversely affecting the future administration of all Federal bankruptcy proceedings. The basis of the decree appealed from which was entered in the District Court and affirmed in the Court

of Appeals, is a so-called "Order on Petition" entered in the Superior Court of Cook County, Illinois, on July 18, 1951, which appears at Tr. 348-353 of the printed Transcript of Record in these proceedings, Nos. 445 and 501, and an amendment thereto entered in said Superior Court of Cook County, Illinois, on September 20, 1951 by the Honorable Samuel B. Epstein, Judge of said Court, which appears at Tr. 357-8 of the printed Transcript of Record.

(3) Said orders entered on July 18, 1951 and September 20, 1951 contain *inter alia* the following permanent injunction against Petitioners and others, to-wit:

> "It Is Further Ordered, Adjudged and Decreed that each and every creditor of the said Chicago Bank of Commerce, their agents and attorneys, be and they are individually and severally permanently enjoined and restrained from instituting and from prosecuting any claims, demands, actions, causes of action, proceedings at law or in equity, against George R. Joslyn on account of any claim, demand, debt or right arising because of George R. Joslyn owning 1142 shares of capital stock of the Chicago Bank of Commerce.
>
> It Is Further Ordered that the Clerk of this Court shall issue a People's Writ of Injunction directed to each and every creditor of the Chicago Bank of Commerce individually and severally and permanently enjoining and restraining them from instituting and from prosecuting any claims, demands, actions, causes of action, proceedings at law or in equity against George R. Joslyn on account of any claim, demand, debt or right arising because George R. Joslyn owned 1142 shares of the capital stock of the Chicago Bank of Commerce." (Tr. 352.)
>
> • • •
>
> "It Is Ordered that the injunction order heretofore entered herein on July 18, 1951 be, and the same is hereby, amended by inserting the following words at the end of each of the first two complete paragraphs on page 6 of said order, to wit:

"Provided, however, that said creditors of Chicago Bank of Commerce, their agents and attorneys, are not enjoined or restrained from prosecuting their rights in the bankruptcy proceeding now pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled 'In the matter of George R. Joslyn, Bankrupt,' No. 62732; *provided, further, that said creditors are individually and severally permanently enjoined and restrained from claiming or asserting in said bankruptcy proceeding that the stockholders liability of George R. Joslyn by reason of his ownership of* 1142 *shares of capital stock of Chicago Bank of Commerce, including liability for interest, if any, exceeds the sum of* $57,100 *heretofore paid to Luke F. Cunniff, Receiver herein, and from claiming or asserting in said bankruptcy proceeding that said stockholder's liability of George R. Joslyn has not been released and satisfied in full pursuant to said order of July* 18, 1951 *heretofore entered herein.*" (Tr. 357-8.) (Italics added.)

(4) As is fully shown by the Petitions for Certiorari filed herein in Nos. 445 and 501 as aforesaid, it is essential to Petitioners' right to petition to this Court for said Writs of Certiorari that Petitioners disclose to this Court the fact that the paramount and exclusive jurisdiction of the Federal Bankruptcy Court in said bankruptcy proceeding entitled "In the matter of George R. Joslyn, Bankrupt" has been invaded and defeated by the order of the District Court herein appealed from and affirmed by the Court of Appeals. It is also essential to such right that Petitioners disclose to this Court that said order of the District Court, and the findings of fact and conclusions of law upon which it is based, terminates the administration of said bankruptcy proceeding upon the theory that the stockholder's liability of George R. Joslyn has been released and satisfied by said orders previously entered in the Superior Court of Cook County, Illinois (Tr. 371-387).

(5) On December 16, 1952, which date was after the filing of the Petitions for Certiorari in Nos. 445 and 501 aforesaid in this Court, George R. Joslyn, Respondent, presented to the Honorable Samuel B. Epstein, Judge of said Superior Court of Cook County, Illinois, in the same cause in which the foregoing permanent injunctions were rendered, his Petition entitled "*Petition to Hold Thomas Hart Fisher, Norman Crawford, Horace Young, John S. Miller, Mario H. Guiarelli and Benevolent and Protective Order of Elks of the United States of America in Contempt.*" The sole purport of said Petition is that the foregoing Respondents should be required and ordered to show cause why they should not be held in contempt of the Superior Court of Cook County, Illinois and punished for violation of the permanent injunctions aforesaid. John S. Miller and Horace Young, who are named as Respondents in the foregoing Petition, are attorneys for Petitioners seeking Writs of Certiorari in Nos. 445 and 501 in this Court. Benevolent and Protective Order of Elks of the United States of America, named as Respondent in said Petition, is the Petitioner seeking a Writ of Certiorari in Docket No. 445 in this Court. Horace A. Young, named as Respondent in said Petition, is one of the Petitioners seeking a Writ of Certiorari in Docket No. 501 in this Court.

(6) It is alleged in said Contempt Petition that the Respondents "acting in conjunction with each other filed with the Clerk of the Supreme Court of the United States a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals, Exhibit F attached hereto [same being the Petition in No. 445]." It is further alleged therein that in and by said Certiorari Petitions the Respondents "are contending before said court [the Supreme Court of the United States]

that the stockholder's liability of petitioner [George R. Joslyn] has not been discharged, [and] that petitioner is liable for interest, in open, wilful and flagrant violation of the injunction herein [the two injunction orders aforesaid]."

(7) The prayer of the foregoing Petition of George R. Joslyn filed in the Superior Court of Cook County, Illinois as aforesaid is as follows:

> "Wherefore, petitioner [George R. Joslyn, the Bankrupt herein] respectfully prays:
>
> 1. That a rule shall be entered herein that Thomas Hart Fisher, Norman Crawford, Horace Young, John S. Miller, Mario H. Guiarelli and the Benevolent and Protective Order of the Elks shall show cause, if any they have, why they should not be punished for contempt of court, and
>
> 2. That the court will duly punish said Respondents for violation of the injunction as aforesaid."

(8) The foregoing Petition presented to the Superior Court of Cook County, Illinois, by George R. Joslyn as aforesaid is signed and sworn to by George R. Joslyn.

(9) The foregoing contempt proceedings now pending in the Superior Court of Cook County, Illinois, as aforesaid are designed to have the effect, and will have the effect, of interfering with the right of Petitioners seeking such Writs of Certiorari in Nos. 445 and 501 to prosecute their Petitions for Certiorari in this Court as aforesaid. Said contempt proceedings thereby interfere with the appellate jurisdiction of this Court in said certiorari proceedings Nos. 445 and 501, and with the constitutional and statutory rights of the Petitioners, and their counsel, to file and prosecute said certiorari proceedings in Nos. 445 and 501 in this Court.

(10) Said contempt proceedings likewise interfere with the paramount and exclusive jurisdiction of the Federal Bankruptcy Courts in general, and in particular with the bankruptcy jurisdiction of the District Court of the United States, the United States Court of Appeals for the Seventh Circuit and the Supreme Court of the United States in said proceeding entitled "In the matter of George R. Joslyn, Bankrupt," originally commenced as No. 62732 in said District Court, and now before this Court in Nos. 445 and 501.

(11) Petitioners have no effective right of direct appeal from said contempt proceedings to protect the appellate jurisdiction of this Court and their constitutional and statutory rights to invoke the same in this Court. Petitioners are, however, entitled by writ in the nature of mandamus, prohibition, injunction or other appropriate remedy to compel the Superior Court of Cook County, Illinois, and the other Respondents hereinabove named in this motion, to withhold all further action in said contempt proceedings pending final disposition by this Court of said certiorari proceedings Nos. 445 and 501. Unless such relief be granted by this Court as prayed herein, Petitioners are under the present threat of being held in contempt and punished in the State Court for invoking the jurisdiction of this Court by prosecuting their certiorari proceedings Nos. 445 and 501.

(12) This Honorable Court is the only court which, in aid of its appellate jurisdiction from the District Court and the United States Court of Appeals for the Seventh Circuit in said certiorari proceedings Nos. 445 and 501, has full and complete jurisdiction to stay said contempt proceedings in and by the Superior Court of Cook County, Illinois, and the other Respondents hereinabove named in this motion; and this Honorable Court is the only Court in

which Petitioners may obtain adequate relief to prevent interference with the exercise by this Court of its appellate jurisdiction in said certiorari proceedings Nos. 445 and 501.

(13) Petitioners have no other effective remedy except by a writ in the nature of mandamus, prohibition, injunction, or other appropriate remedy, to compel the Superior Court of Cook County, Illinois, and the other Respondents named in this motion to stay all further contempt proceedings as aforesaid until final disposition of said certiorari proceedings by this Court in Nos. 445 and 501.

(14) Petitioners are wholly without adequate remedy in the premises unless their motion be granted herein.

Wherefore, Petitioners respectfully pray herein:

(1) That this Honorable Court will direct the Superior Court of Cook County, Illinois, the Honorable Samuel B. Epstein, Judge of said Court, and George R. Joslyn, Bankrupt, Respondents herein, to show cause why a writ in the nature of mandamus, prohibition, injunction or other appropriate remedy should not issue against them and each of them in accordance herewith.

(2) That this Honorable Court will direct the Superior Court of Cook County, Illinois, and the Honorable Samuel B. Epstein, Judge thereof, and George R. Joslyn, bankrupt, forthwith to stay the foregoing contempt proceedings pending final disposition of the Petitions for Certiorari in Nos. 445 and 501 now pending in this Court.

(3) That this Honorable Court will grant such other and further relief to Petitioners as may be just and meet in the premises.

(4) That this Honorable Court will retain jurisdiction herein for any further or other action or orders as may be required in the premises.

The Benevolent and Protective Order of Elks of the United States of America, and Horace A. Young, as Trustee in Bankruptcy,

By .....
JOHN S. MILLER,

By .....
HORACE A. YOUNG, as Trustee in Bankruptcy *Pro Se*,
Their Attorneys,
Petitioners.

State of Illinois,
County of Cook—ss.

JOHN S. MILLER, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Petitioners above named; that he is personally acquainted with all of the matters and things therein set forth; and that affiant is informed and believes, and on the basis thereof states, that all of the facts therein set forth are true and correct to the best of his knowledge and belief.

.....
JOHN S. MILLER

Subscribed and sworn to before
me this 6th day of January, 1953.

.....
Alma Holmes,

Notary Public in and for the County of Cook, State of Illinois.

IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

Nos. 445 AND 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,

Respondents.

BRIEF IN SUPPORT OF MOTION FOR WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, INJUNCTION, OR OTHER APPROPRIATE REMEDY.

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

This motion is made pursuant to Section 1651(a) of the Federal Judicial Code (28 U.S.C. §1651(a)) which provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The facts upon which this motion is based are clearly set forth in the motion, as well as in the Petitions for Certiorari heretofore filed in this Court in Nos. 445 and 501. The fundamental issue in both Petitions concerns a direct conflict in jurisdiction between the Federal Bankruptcy Court and the Illinois State Court.

The injunction orders entered in the Superior Court of Cook County, Illinois, on July 18, 1951 and September 20, 1951, insofar as they enjoin the prosecution of bankruptcy proceedings in the Federal Bankruptcy Court, constitute a palpable invasion of the paramount and exclusive jurisdiction of the Federal Bankruptcy Court in bankruptcy proceedings. The Federal cases in this Court and the Courts of Appeals so holding are set forth on pages 26 and 27 of the Petition for Certiorari in No. 445.

That injunction orders of this type may not properly enjoin bankruptcy creditors and their agents and attorneys from exercising their rights freely in the Federal Bankruptcy Courts under the Federal Constitution and Federal Bankruptcy Act is too plain and obvious for discussion or argument. Even the Courts of Illinois have condemned such orders and have held them to be void. *City National Bank & Trust Co.* v. *Davis Hotel Corp.*, 280 Ill. App. 247, 252 (1935); *DeKalb Trust and Savings Bank* v. *DePaul*, 278 Ill. App. 102 (1934).

But regardless of the legality or illegality of said injunction orders themselves, it is elementary that this Court, acting in aid of its appellate jurisdiction, may and should issue writs of mandamus, prohibition, or injunction, or grant other appropriate relief to prevent any other court, or any litigants therein, from interfering either by contempt citations, or otherwise, with the appellate jurisdiction of this Court, or with the rights of all litigants properly before the Court in pending certiorari proceedings to prosecute the same in due course.

We cite:

Ex parte Republic of Peru, 318 U.S. 578 (1943);
Ex parte United States, 287 U.S. 241 (1932);
Smith v. *Whitney*, 116 U.S. 167 (1886).

See also the following cases in which this Court, although denying the writ on the particular facts, recognized the above stated principle of law:

Ex parte Fahey, 332 U.S. 258 (1947);
Ex parte United States, 263 U.S. 389 (1923);
Fisher v. *Hurst*, 333 U.S. 147 (1948)..

The institution of said contempt proceedings at the very time that the Certiorari Petitions are pending in this Court in Nos. 445 and 501 brings sharply to focus before this Court the fundamental conflict of jurisdiction between the paramount and exclusive jurisdiction of the Federal Bankruptcy Court in bankruptcy matters, on the one hand, and the jurisdiction of the Superior Court of Cook County, Illinois, on the other hand, and the attempts of the State Court to interfere with the Federal jurisdiction, which is the central issue in said Petitions.

The brazen attempt to interfere with the appellate jurisdiction of this Honorable Court in the certiorari proceedings in Nos. 445 and 501 by the institution of said contempt proceedings in the Illinois State Court, in the effort thereby to deprive the Petitioners in said certiorari proceedings of their right to prosecute the same before this Court, is not only an improper and illegal action in itself, but also characterizes the actions of the Bankrupt throughout the course of this proceeding both in the District Court and in the United States Court of Appeals for the Seventh Circuit.

Surely this Court will be amazed, if not affronted, that any litigant in any other court, State or Federal, should

seek to bar the door of this Court to a lawful and proper application for relief in this Court in certiorari proceedings.

Petitioners respectfully submit that the relief prayed in this motion should be promptly and forthwith granted by this Honorable Court.

Respectfully submitted,

The Benevolent and Protective Order of Elks of the United States of America, and Horace A. Young, as Trustee in Bankruptcy,

By .....
JOHN S. MILLER,

By .....
HORACE A. YOUNG, as Trustee in Bankruptcy *Pro Se*,
Their Attorneys,
Petitioners.

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FILED
JAN 31 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 445 and 501

IN THE MATTER OF GEORGE R. JOSLYN, Bankrupt.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,

Respondents.

OBJECTIONS OF GEORGE R. JOSLYN TO THE MOTION FOR A WRIT IN THE NATURE OF MANDAMUS, ETC., AND SUGGESTIONS.

ALVIN GLEN HUBBARD,
Attorney for George R. Joslyn.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 445 and 501.

IN THE MATTER OF GEORGE R. JOSLYN, Bankrupt.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,
Respondents.

OBJECTIONS OF GEORGE R. JOSLYN TO THE MOTION FOR A WRIT IN THE NATURE OF MANDAMUS, ETC., AND SUGGESTIONS.

Now comes GEORGE R. JOSLYN and objects to the Motion for a Writ of Mandamus, Prohibition, Injunction or other appropriate remedy.

A.

There is no basis for any supposed jurisdiction.

B.

STATEMENT.

On September 13, 1951 the Elks by John S. Miller, Thomas H. Fisher and Norman Crawford, its attorneys, presented a fifteen-page petition to the Superior Court of Cook County, Illinois, in *Hillmer* v. *Chicago Bank of Commerce,* No. 560305. (Tr. 294-310.) Petitioner asked that the decree of July 18, 1951 be vacated as being null and void. It prayed that the State Court receiver be restrained from disbursing the $57,100 paid in. (Tr. 309.) This money had been paid by George R. Joslyn's father. (Tr. 377.)

On September 20, 1951 the Superior Court entered a final decree on this petition. The Court found

> "that the allegations of said petition constitute no ground for any of the relief prayed." (Tr. 294.)

That the bankruptcy trustee joined in the proceedings in the State Court appears from the Elks' petition:

> "Upon learning of the foregoing proceedings in the state court the trustee in bankruptcy and the Elks unsuccessfully endeavored in the state court to have the state court order vacated and to induce the bankruptcy court not to enter the final decree appealed from." (Elks' Pet. for Certiorari, p. 8.)

The Bankruptcy trustee and New Jersey Equities repeat said statement,

> "Petitioners adopt in all respects the petition of the Benevolent and Protective Order of the Elks." (Young & N. J. Eq. Pet. for Certiorari, p. 2.)

The order modifying the decree was entered in the Superior Court on September 20th, 1951. (Tr. 294; Tr. 357-58.) Every matter which the Trustee, the Elks and the other purported creditors seek to litigate here they liti-

gated in the Superior Court of Cook County, Illinois. At the conclusion the court entered the two decrees on September 20th, 1951.

PROPOSITIONS OF LAW.

I.

SINCE THE STATE COURT PROCEEDINGS DO NOT SEEK TO INTERFERE WITH ANY RES IN THE ACTUAL OR CONSTRUCTIVE POSSESSION OF THE UNITED STATES COURT, THERE IS NO BASIS FOR AN INJUNCTION RESTRAINING THE STATE COURT PROCEEDINGS.

Kline v. *Burke Constr. Co.* (1922), 260 U. S. 226.

Mandeville v. *Canterbury* (1943), 318 U. S. 47.

United States Code Title 28, Sec. 2283.

"S. 2283. Stay of State Court Proceedings.

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968."

A.

Under Illinois Law the Court Properly Enjoined the Thousands of Creditors of the Bank From Suing.

Groves v. *Farmers State Bank* (1938), 368 Ill. 35, 47-48; 12 N. E. 2d 618.

Decker v. *Domoney* (1944), 387 Ill. 524, 529; 56 N. E. 2d 750.

Babka Plastering Co. v. *City State Bank* (1931), 264 Ill. App. 142 at 153.

Leonard v. *Bye* (1935), 361 Ill. 185, 190, 192; 197 N. E. 546.

Walton v. *Albers* (1942), 380 Ill. 423; 44 N. E. 2d 145.

B.

Having Entered the Injunction, It Is Proper for the Superior Court to Enforce It.

In Re Metz (1925, 2d Cir.), 6 Fed. (2d) 962.

In re Broadway Hotel Co. (1941, 7th Cir.), 124 Fed. (2d) 891.

Union Oil of Cal. v. *Domengeaux* (1939), 86 Pac. (2d) 127 at 131; 30 Cal. App. (2d) 266.

Strickland v. *Darsey* (1923), 156 Ga. 717; 120 S. E. 7.

ARGUMENT.

I.

SINCE THE STATE COURT PROCEEDINGS DO NOT SEEK TO INTERFERE WITH ANY RES IN THE ACTUAL OR CONSTRUCTIVE POSSESSION OF THE UNITED STATES COURT, THERE IS NO BASIS FOR AN INJUNCTION RESTRAINING THE STATE COURT PROCEEDINGS.

In *Kline* v. *Burke Constr. Co.* (1922), 260 U. S. 226 the construction company filed a bill ancillary to an action at law in the United States District Court to enjoin proceedings instituted in the state court after its action at law. After stating that in proceedings *in rem* or *quasi in rem* the first court obtaining jurisdiction of the *res* retains same to the exclusion of other courts of concurrent jurisdiction, the court said:

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, an-

other action for the same cause in another jurisdiction is not precluded."

Kline v. *Burke Constr. Co.*, 260 U. S. 226 at 230.

In this case George R. Joslyn's father paid the claim in the State Court. (Tr. 377.) The Superior Court by its decree does not adjudicate any rights in any *res* in the actual or constructive possession of the U. S. District Court.

In *Mandeville* v. *Canterbury* (1943), 318 U. S. 47, the plaintiffs in U. S. District Court sought construction of a will. Defendants sued in Minnesota and Wisconsin seeking construction of the will. The U. S. District Court enjoined the two proceedings. The Court referred to Section 265 (now Section 2283) of the Judicial Code and the exception where the court had *a res* with which it was called upon to deal, and said:

"But where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as *res judicata* in the other."

Mandeville v. *Canterbury*, 318 U. S. 47 at 49.

In the State Court proceeding Joslyn's father paid the liability. Upon receipt of payment the court restrained the thousands of creditors from suing George R. Joslyn. It did not by its decree seek to interfere with any *res* in the possession or control of any other court.

A.

Under Illinois Law the Court Properly Enjoined the Thousands of Creditors of the Bank From Suing.

It is basic Illinois law that in a representative suit the court will enjoin the numerous creditors from suing in separate actions.

See cases cited under this Point Under Propositions of Law.

See Opinion of Judge Hoffman who entered the State Court Decree. (Tr. 396-397.)

B.

Having Entered the Injunction, It Is Proper for the Superior Court to Enforce It.

In re Metz (1925 2d Cir.), 6 Fed. (2d) 962, Dealy obtained a judgment *in tort* against Metz in the State Court. On October 26, 1923 Metz filed a petition in bankruptcy. On November 7, 1923 the State Court ordered him to pay the judgment as a fine. On December 15, 1923 the State Court adjudged him in contempt for not paying. The District Court enjoined the State Court proceedings.

Reversing the order, the Court of Appeals held that the District Court could not enjoin the State Court proceedings in the absence of a showing that the debt was dischargeable.

In re Broadway Hotel Co. (1941, 7th Cir.), 124 Fed. (2d) 891 one Thomas sued the bankruptcy trustees in the state court for libel. The Bankruptcy Court enjoined the State Court proceeding. Reversing the judgment the court said:

"The suit commenced by the appellant in the Circuit Court of Cook County, Illinois, was not a suit in

which the plaintiff (appellant here) sought to interfere with property in the custody of the bankruptcy court, nor was the restraining order necessary to effectuate any decree entered by the District Court in the reorganization proceeding."

In re Broadway Hotel Co., 124 Fed. (2d) 891 at 891.

In *Union Oil Co. of Cal.* v. *Domengeaux* (1939), 86 Pac. (2d) 127 at 131; 30 Cal. App. (2d) 266, the Oil Company sought an injunction against the bankruptcy trustee and others from acts done on land belonging to plaintiff. The court held that the bankruptcy trustee was amenable to the injunction suit.

In *Strickland* v. *Darsey* (1923), 156 Ga. 717; 120 S. E. 7 Darsey instituted proceedings in the State Court to set aside a fraudulent conveyance to A. J. Strickland. The court appointed a permanent receiver. The debtor, namely J. B. Strickland, was afterwards adjudicated a bankrupt. In ancillary proceedings the court restrained and enjoined A. J. Strickland from asserting or proving up in the bankruptcy proceeding his supposed claim. The Supreme Court of Georgia held the action proper.

It is respectfully submitted that the motion is without merit and should be denied.

Respectfully submitted,

ALVIN GLEN HUBBARD,
Attorney for George R. Joslyn.